

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

No. 9983

14

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NELLIE REICHARD, *Appellant*

VS.

LOUIS A. WELLS, *Appellee.*

Appeal from the United States District Court for the
District of Columbia

United States Court of Appeals
for the District of Columbia
Circuit

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 9983

NELLIE REICHARD, *Appellant*

VS.

LOUIS A. WELLS, *Appellee*.

Appeal from the United States District Court for the
District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the United States District Court for the District of Columbia, upon a jury verdict of \$2,500 in favor of appellee, Louis A. Wells, plaintiff below and hereinafter referred to as plaintiff, against appellant, Nellie Reichard, defendant below and hereinafter referred to as defendant (App. 5 A), Motion of Defendant to Set Aside Verdict of Jury, and to Have Judgment Entered in Accordance with Defendant's Motion

for Directed Verdict; or, in the Alternative, That Defendant Be Granted a New Trial (App. 6 A) having been denied pursuant to Memorandum of the Justice before whom the case was tried (App. 8 A) and Notice of Appeal having been duly filed (App. 8 A, 9 A). Plaintiff sought damages for False Arrest and Malicious Prosecution after having been found not guilty on a charge of drunkenness (App. 2 A, 3 A). The relief claimed was within the general law jurisdiction of the District Court, D. C. Code, 1940 Edition, Title 11, Sec. 301, and a review by this court of the judgment below is authorized by Title 17, Sec. 101 of the same code.

PRELIMINARY STATEMENT

The questions submitted upon this appeal relate to the failure and refusal of the trial court to grant defendant's motion for a directed verdict based on the plaintiff's evidence, and a motion for a directed verdict based on the whole evidence, its failure and refusal to instruct the jury in accordance with the law, and its failure and refusal to enter judgment for the defendant, or, in the alternative, to grant defendant a new trial. The defendant contends that the court erred in submitting the issues to the jury and that there is no evidence sufficient to support the verdict and judgment.

STATEMENT OF THE CASE

The Complaint.

The plaintiff, Louis A. Wells, brought an action to recover damages for "False Arrest and Malicious Prosecution" (thus combining two separate and distinct causes of action into one cause of action) claiming that the defendant, Nellie Reichard

On the 2d day of October, 1946, wilfully and maliciously and without probable cause, caused him to be arrested by the Metropolitan Police Department on a charge of drunkenness, restrained of his liberty by being placed in jail (App. 2 A)

and that subsequently

on the 5th day of October, 1946, the defendant wilfully and maliciously and without probable cause, caused the plaintiff to be prosecuted by being put on trial in the Municipal Court, wherein he was acquitted (App. 2 A)

and that he suffered damage to his person, his good name, and reputation. (App. 3 A)

The defendant denied that she had caused the arrest of the plaintiff, or that she had caused any prosecution of the plaintiff on the charge of being drunk or otherwise. (App. 3 A to 5 A)

A \$2,500 verdict and judgment in favor of plaintiff was entered. (App. 5 A, 6 A)

The Evidence As To False Arrest.

For the plaintiff.

(1) Plaintiff testified that "we" (meaning himself, wife, and another man) went to defendant's (mother-in-law's) home and into the basement where she was then ironing; that some words were there had. He then went out and across the street, looked for a policeman, called his private detective on the phone, came out of the residence from which he had phoned (across from 1816 Ingle-side Terrace) (App. 10 A), walked over to a police car, where a policeman in the car (not the driver) just pulled the door open and put him into the back of the car. This occurred in the middle of the street in front of 1816 Ingle-side Terrace. (App. 11 A) Then his mother-in-law, (the defendant, Mrs. Reichard) came out and into the street, said something to the policeman while at the car door—

to the officer driving the car—which he, the plaintiff, could not hear (App. 11 A, 15 A); that he was taken to No. 10 Police Precinct, placed in a cell at about 10:30 P. M. and released at about 3:40 P. M. (App. 12 A)

(2) Plaintiff's witness Mrs. Falwell, testified that about 10 o'clock the evening of October 2, 1946, plaintiff had come to her door at 1825 Ingleside Terrace to tell her that he had been arrested for being drunk. She gave absolutely no evidence concerning either any arrest or prosecution. (App. 16 A, 17 A).

(3) Franklin Louis Wells, nine-year-old minor son of plaintiff, testified that his grandmother, (the defendant Mrs. Reichard) had told him that "she had had Daddy (the plaintiff, Wells) arrested and that was about all". (App. 18 A) This child witness claimed the defendant made this statement to him the day after plaintiff was arrested. (App. 18 A)

This was the entire evidence as to false arrest adduced by plaintiff.

A motion for a directed verdict was interposed at this point, (at the close of plaintiff's case) on behalf of the defendant, which motion was denied by the court. (App. 23 A, 24 A).

For the defendant.

(1) Officer Fries of Metropolitan Police Department, testifying from records of Radio Scout Car 101, stated that in response to a call at 10:20 P. M. October 2, 1946 to 1816 Ingleside Terrace for disorderly drunk, he arrested Mr. Wells (the plaintiff) (App. 26 A). He stated that Mr. Wells was, in his opinion in a drunken condition, was placed in a scout car, carried to No. 10 precinct, charged with drunk; that no one asked him to charge Wells; that he never saw anyone at that time (of the arrest) other than plaintiff (Wells) as far as he could

remember, and that he had never before (the time of trial) seen the lady (meaning the defendant, Reichard). He stated he was on the passenger side of the car and that Officer Grafton was driving the car. (App. 26A) Officer Fries described the plaintiff (Wells), when arrested, as "either he was highly nervous or had been drinking quite a bit" (App. 26A) and as "the average fellow that has had one drink too many" (App. 27A) On cross-examination Officer Fries stated that he received a routine call over the radio, that he was on the passenger side of the radio car, went to 1816 Ingleside Terrace, observed Wells (plaintiff) "staggering" or "wavering around", "not walking straight" (App. 27 A) and that he "was not walking like he was going to some definite address", that he took him into custody, smelled his breath (App. 28 A) and that after placing Wells under arrest, he proceeded to No. 10 precinct.

(2) Officer Grafton stated that he had no recollection independent of the record concerning the arrest of Mr. Wells.

It was stipulated that the record book of No. 10 precinct showed that Louis Allen Wells was booked at 10:40 PM (Oct. 2, 1948). (App. 32 A)

(3) Mrs. Eleanor Pauline Wells (wife of plaintiff but separated from him) testified she was on her way to the movies with a Mr. Maher, that a cab kept coming up and down the street until Mr. Wells got out; that she, Wells, and Maher returned to her mother's (Mrs. Reichard, defendant) home; Wells left the home, but did not leave front of house, that, being afraid, she called police "just to ask to have him moved on, to make him go home. And all they said was that they would take care of it." (App. 34 A) On cross-examination she testified she called the police from the telephone in the house, because her husband (Wells, plaintiff) "wouldn't leave the front of the house",

that she expected the police "to make him move on", that she wanted to go to bed but was afraid, and that her husband had threatened her innumerable times. (App. 33 A, 34 A, 35 A).

(4) Mrs. Reichard (defendant) stated she was ironing when her daughter and Mr. Maher left her house to start for the movies, that they returned about 20 minutes later with Mr. Wells (App. 37 A); that her daughter Eleanor (Mrs. Wells) called the police (App. 38 A); that, from the front of her house, she saw the police scout car "pick up" Mr. Wells (plaintiff); that after Wells was in the scout car she opened her front door and the officers, seeing her, stopped the car; that she approached the car, was asked by an officer if she knew the man and she advised him that she did know him to be her son-in-law (Wells, the plaintiff); that she asked what they were going to do with him and was advised they were taking him to No. 10 precinct and that if she wanted to see him she would have to come there, and then the scout car pulled away. (App. 38 A) On cross-examination she stated she talked to the officer while standing right beside the scout car after he (plaintiff) was in the scout car, but did not understand that he was under arrest.

The Evidence As To Malicious Prosecution

For the plaintiff.

The plaintiff merely stated that when he came to court Saturday morning, he was exonerated and given back his ten dollars. He did not offer a scintilla of evidence that the defendant participated in the prosecution in any manner whatsoever. (App. 13 A)

For the defendant.

The Information, District of Columbia v. Lewis A. Wells, charges that on the 2d day of October, 1946 in the D. of C. on Ingleside Terrace, N. W., defendant was then and there

drunk and intoxicated, etc.; that it was sworn to by Officer R. H. Fries, before the prosecutor, Richard Barton, Asst. Corpn. Counsel in and for the District of Columbia, and that he was the sole witness. (App. 42 A, 43 A) Officer Fries testified he remembered that the information was filed, the case set for Oct. 5th, a plea of not guilty entered, and judgment of not guilty. (App. 27 A)

The foregoing evidence as to "False Arrest" and as to "Malicious Prosecution" constitutes the entire evidence in the case.

On this whole evidence, the defendant again moved for a directed verdict, and this motion was denied. (App. 42 A, 43 A).

The Court's Instructions To The Jury

When defendant tendered a requested instruction before the court actually instructed the jury, the court refused the instruction (App. 45 A) and after giving a general instruction to the jury, the court again refused to give either the instruction or the substance of the instruction as to the law on that point, (51 A), stated "I will tell them frankly that I think in this case, to find for the plaintiff, they must find that she (meaning the defendant) called or caused to be called the police officers, asking them to arrest the plaintiff on the charge of drunkenness." and (referring to the statement of the court just quoted) "I will charge them that; but that is all I will do." And when defendant's counsel still sought correct and clarifying instructions for the jury from the court, he was cut off with the response, "You have argued that to them. I am not going to argue the case. That is one of the elements that must be shown." (51 A) Then the court gave an instruction apparently in conflict with its previous instruction (52 A) but nothing defining "False Arrest."

The court started its instructions to the jury by stating he was *sure* that they understood the plaintiff was seeking

damages from the defendant for alleged “malicious prosecution” and then proceeded to define the elements of malicious prosecution. (App. 45 A, 46 A).

In the course of the charge the court instructed the jury that in fixing damages, they must find the four elements of malicious prosecution, and the damages that would flow from the malicious prosecution. This appears twice in the court’s instructions. (App. 47 A, App. 50 A). This was to be the sole standard of the right of the plaintiff to recover, and how his damages should be calculated.

Yet the court, in instructing the jury, also stated the action was “the arrest and prosecution” (App. 47 A) and apparently contradicted all its previous instructions about malicious prosecution, when it instructed the jury “To find for the plaintiff, against the defendant, in this cause, you must find from the evidence — and, of course that means you can make reasonable inferences from facts you have found from the evidence — that the defendant did call or caused to be called the police officers, asking them to arrest the plaintiff on the ground of drunkenness.” (App. 52 A). The court did not explain or define to the jury false arrest, or false imprisonment.

STATEMENT OF POINTS UPON WHICH APPELLANT RELIES

1. The court erred in refusing to instruct the jury to render a verdict for the defendant at the close of the plaintiff’s case.
2. The court erred in refusing to instruct the jury to render a verdict for the defendant at the close of the whole case.
3. The court erred in submitting the issues to the jury.
4. The court erred in refusing to instruct the jury as requested by defendant, either in the specific language sug-

gested, or in language to cover the substance of the specific language suggested; and in refusing to correct or complete instructing the jury pursuant to law.

5. There is no substantial evidence to sustain the verdict of the jury.

6. The verdict and judgment are excessive.

7. The court erred in denying the "Motion of Defendant to Set Aside Verdict of Jury, and to have Judgment entered in Accordance with Defendant's Motion for Directed Verdict; or, in the alternative, That Defendant be Granted a New Trial."

SUMMARY OF ARGUMENT

This case being a "Complaint for Damages for False Arrest and Malicious Prosecution" a combining of two separate and distinct causes of action into one cause of action, it was incumbent upon plaintiff to prove every element of "False Arrest" and "Malicious Prosecution" before he could recover. This he failed to do with respect to either.

Since there is no substantial evidence to prove either "False Arrest" or "Malicious Prosecution" — and certainly no substantial evidence to prove both of these causes of action combined in one as in this case — either at the close of the plaintiff's case, or at the close of the whole case, the motion for a directed verdict for defendant should have been granted.

Even though the court erroneously submitted the issues to the jury, in so doing it was its duty to correctly instruct the jury as to the law applicable to "False Arrest" and "Malicious Prosecution". This it failed to do, and when correct and clarifying instructions were sought by defendant, the court, after stating, among other things, "that is ALL I will do" and "I am not going to argue the case",

then proceeded to erroneously and incompletely instruct the jury concerning the law applicable to the case.

The court erroneously failed to set aside verdict of jury and enter judgment in accordance with defendant's motion for a directed verdict, or in the alternative, to grant defendant a new trial. This motion was characterized as merely a motion for a new trial and denied. The record would have amply justified the court in granting the motion as made.

ARGUMENT

1. The Court Erred in Refusing to Instruct the Jury to Render a Verdict for the Defendant at the Close of the Plaintiff's Case.

COMPLAINT FOR DAMAGES FOR FALSE ARREST AND MALICIOUS PROSECUTION

From paragraph 3 of the complaint, it will be noted that the plaintiff charges that the defendant

on the 2d day of October, 1946 wilfully and maliciously and without probable cause caused him to be arrested by the Metropolitan Police Department on a charge of drunkenness, restrained of his liberty by being placed in jail (App. 2 A)

and that

subsequently on the 5th day of October, 1946, the defendant wilfully and maliciously and without probable cause, caused the plaintiff to be prosecuted by being put on trial in the Municipal Court, wherein he was acquitted (App. 2 A)

and that he suffered damage to his person, his good name, and reputation.

The "False Arrest" or "False Imprisonment" charge above made, has been referred to and defined by this court. In *Auerbach v. Freeman*, 43 App. D. C. 176, (1915) at p. 179, the court reversed a judgment of the lower court en-

tered in a malicious prosecution case. "There is a difference between a false imprisonment which means an imprisonment without any process whatever, or under color of process wholly illegal." * * * *

"In *Lewin v. Uzuber*, 65 Md. 341, 4 Atl. 285, an action for malicious prosecution, a magistrate, at the instigation of the defendant, issued a paper upon which the plaintiff was arrested, and which the court of appeals was unable to recognize 'as a warrant or writ,' holding its illegality to be so apparent upon its face that it afforded one making the arrest no protection. 'That being so' said the court, 'it follows very clearly, we think, that the plaintiff cannot maintain this action. The distinction between an arrest by an officer under a warrant legally issued and coming into his hands in a lawful manner, and one made without warrant, or under process from a court having no authority to issue it is clearly drawn. Hence the distinction at common law between action for false imprisonment and that for malicious prosecution. The former is a suit for trespass, and the latter an action on the case.'"

In *Carroll v. Parry*, 48 App. D. C. 453, at p. 457, this court stated

"False imprisonment consists in the unlawful restraint of one person by another."

In this *Carroll v. Parry* case, the court held, at p. 461 that since "Instead of merely stating that the defendants had unlawfully caused him to be arrested and imprisoned, as he might have done, he forestalled their possible defense and deliberately characterized their acts as done in bad faith and from a corrupt motive." and having done so, it was error for the court to state that it was for the defendants to prove the negative of the positive averment of plaintiff. This is mentioned because the plaintiff in the case at bar has failed to prove a "false arrest" by defendant, and failed to prove the positive averment made by him as to "false arrest."

As to the other part of the plaintiff's combined cause of action in this case, namely, "Malicious Prosecution" this court has adopted the ruling of the Supreme Court of the United States. In *Chapman v. Anderson*, 55 App. D. C. 165, 3 Fed. (2d) 336, the court said at page 168:

"To support an action for malicious criminal prosecution the plaintiff must prove the fact of prosecution, and that the defendant himself was the prosecutor, or that he instigated its commencement, and that it was made without probable cause, and that the defendant in making or instigating it was actuated by malice, and that damages conforming to legal standards resulted to the plaintiff. *Wheeler v. Nesbitt, et al.*, 65 U. S. 544; 16 L. Ed. 765. * * * Malice may be presumed from the lack of probable cause, if not inconsistent with other facts in the case. Lack of probable cause cannot be inferred from the presence of malice. *Wheeler v. Nesbitt, supra.*

THE EVIDENCE OFFERED BY THE PLAINTIFF

(1) *Plaintiff* testified that "we" (meaning himself, wife, and another man) went to defendant's (mother in law's) home and into the basement where she was then ironing; that words were there had as follows (quoting the exact testimony of plaintiff):

"And when we got down there, I told my mother-in-law, I says, 'This is the fellow she has been going with all the time, while I was in the hospital and all.'"
 "So my mother in law spoke up and said, 'I gave her the right to go with him.' Well, anyway, I went on out." * * * (App. 10 A)

Plaintiff then described his going across the street and his efforts to reach a policeman and his private detective by phone, his coming out from phoning, and his seeing a Police Scout car stop in the middle of the street in front of 1816 Ingleside Terrace (the home of defendant); that he walked off the sidewalk to the car, when a policeman in the car (not the driver) just pulled the door open and put him into the

back of the car. Then the defendant (his mother in law) came out into the street, and said something to the policeman in the car — while at the car door, and to the officer driving the car, which he, the plaintiff, could not hear (App. 11 A, 15 A); that they then turned around and he was taken to No. 10 precinct, placed in a cell there at about 10:30 PM and released at about 3:40 AM (App. 12 A). This was plaintiff's testimony concerning his arrest and imprisonment. This happened the night of Oct. 2, 1946.

Concerning "Malicious Prosecution". The plaintiff merely stated that when he came to court Saturday morning (Oct. 5, 1946) he was exonerated and given back his ten dollars collateral. He did not offer a scintilla of evidence that the defendant participated in the prosecution in any manner whatsoever. (App. 13 A)

(2) Plaintiff's next witness, Mrs. Falwell, testified that about 10 o'clock the evening of Oct. 2, 1946, plaintiff had come to her door at 1825 Ingleside Terrace to tell her he had been arrested for being drunk. She also testified in response to the question "Q. How many times did you talk to Mr. Wells *around* October 2nd? A. Well, I talked to him several times. But neither time he talked to me, he was not drinking." (17 A). This witness gave absolutely no testimony concerning any arrest or any prosecution. (App. 16 A, App. 17 A).

(3) Franklin Louis Wells, nine year old minor son of plaintiff, testified that his grandmother, (the defendant, Mrs. Reichard) had told him the day after plaintiff was arrested that "she had had Daddy (the plaintiff, Wells) arrested and that was about all." (App. 18 A). The minor further testified under questioning:

"Q. What, exactly, was said to you about your father having been arrested?

A. Well, they didn't tell me, and then after he told me, well, Eleanor — that is my mother — she told me about him being arrested once. Then Nellie, that is my grandmother — she told me too.

- Q. She told you what? A. She said he had been drunk that night, and she had him arrested. And they both said he was drunk. (App. 19 A, 20 A)

Under cross-examination he stated:

- Q. You say they had your father arrested? A. Yes.
Q. And by that, you mean your mother? Yes, sir.

THE MOTION FOR A DIRECTED VERDICT FOR DEFENDANT

Bearing in mind the fact that both the Complaint (App. 2 A, 3 A) and the Pretrial Proceedings show this to be "an action" for "False Arrest" and "Malicious Prosecution", and taking cognizance of the lack of evidence to support either charge, defendant moved for a directed verdict at the close of plaintiff's case (App. 23 A, 24 A) which the court denied. The defendant contends that since the plaintiff did not abandon or change his complaint, he was bound to prove every element of both "False Arrest" and "Malicious Prosecution", and that since he had not proven every element of either or both parts of his action, the court should have granted the motion for directed verdict interposed at the close of plaintiff's case on behalf of the defendant.

In the earliest case counsel has been able to find in the District of Columbia, i.e., *Benham v. Vernon* (May 14, 1886) 5 Mackey (16 DC) 18, upon the advice of counsel one of the defendant's (other defendants went to police station) informed an officer that a forgery and larceny had been committed and undertook to state the circumstances (whether true or not) which induced them to believe plaintiff was guilty. The officer started out to obtain a warrant, but being too late to get same and fearing plaintiff would flee, the officer arrested plaintiff without warrant. The question was whether the informing defendants "so participated in the arrest as to render them guilty of trespass; or whether, on the other hand, if their action consisted in merely lodging an information, correct or incorrect, which

induced the police officer to make the arrest, but in which their participation extended no further, they were liable in an action for trespass.

The court said, of this:

“And we think upon principle, it cannot be so. The true principle is that where the officer proceeds upon information given him, the information is simply something which causes the act of arrest, but it is not itself the act. If the information which induces the officer to arrest the party turns out to be untrue, that does not make the informer a trespasser *vi et armis*.”

In this *Benham v. Vernon* case, the court reversed finally as to all defendants not implicated, and gave a new trial as to the others.

Before denying the motion for directed verdict, the court said of the evidence:

“It isn’t very strong, but there is certainly evidence. He said this defendant had a conversation with the police officer, at or about the time he was taken into custody. That would not be enough. Then you have testimony of this boy that the defendant says she caused his arrest. And you can take both of them — and I am not talking about what credibility the jury should give to it — but isn’t it evidence?” (App. 24 A)

The plaintiff himself established conclusively that the officer, not the defendant, placed him under arrest when he walked off the sidewalk to the middle of the street where the police car had stopped in front of 1816 Ingleside Terrace, N. W., when the officer in the car — not the driver — “* * * I saw the policeman here a while ago — and that policeman, he didn’t do a thing, without letting me say a word or anything, he just pulled the door open * * * Anyway, he grabbed me by the shoulder and started to pulling me in. * * * Then the policeman grabbed me by the shoulder and pulled me in there. And I told him I wanted to see him; and he wouldn’t tell me what he was pulling me in for, just pulled me in.” (App. 11 A)

Afterward, the plaintiff indicated, the defendant came out into the street, and said something to the policeman in the car — while at the car door, and to the officer driving the car, which he, the plaintiff, could not hear (App. 11 A, 15 A) then the car turned around and he was taken to No. 10 precinct. (App. 11 A)

The equivocal statement of the boy, Franklin Louis Wells.

Referring to the defendant as “she” he said “she had had Daddy arrested and that was about all, you know”. (App. 18 A) “She said he had been drunk that night, and she had him arrested.” (App. 20 A).

The testimony of the nine year old boy was all that prevented the court from directing a verdict for the defendant at the close of plaintiff’s case, according to the court’s statement (App. 24 A).

It is submitted, as a matter of law, that this equivocal statement of this boy witness together with the balance of the plaintiff’s testimony, was wholly insufficient to cause the court to refuse to direct a verdict in favor of the defendant on the plaintiff’s case — an “action” for “false arrest” and “malicious prosecution.”

The testimony of the boy witness — which the court admittedly asserted was the sole evidence to prevent a directed verdict in favor of the defendant at the close of plaintiff’s case, was an equivocal statement. The alleged admission by the defendant to this boy was a general indefinite statement which did not show either

- (a) that the defendant actually arrested the plaintiff,
- (b) that the officer arrested the plaintiff at the request of the defendant,
- (c) that the officer arrested the plaintiff under the persuasion of the defendant,
- (d) that the defendant participated or assisted in the arrest with the officer.

So far as the alleged admission by the defendant, if ac-

tually made, is concerned, the statement by the defendant could have the meaning either

- (a) that the defendant, in good faith, believed plaintiff to be drunk
- (b) that the defendant made a complaint by phone to police headquarters
- (c) that the complaint made was received by one person, relayed to a second person, who relayed it to a radio police dispatcher of the police department, who relayed it to the scout car in which the arresting officer was on duty,
- (d) that the scout car reached the vicinity from which the complaint originated,
- (e) that an officer in the scout car, noting plaintiff "staggering" or "wavering around", "not walking straight", "not walking like he was going to some definite address", and appearing to the officer "the average fellow that has had one drink too many" and "either he was highly nervous or had been drinking quite a bit" — arrested the plaintiff in the exercise of the discretion conferred upon him as an officer.

Such an equivocal statement establishes nothing. Evidence which is equally as consistent with innocence as with guilt in the criminal law establishes nothing. In the law of torts, evidence as consistent with the hypothesis of negligence, as with lack of negligence, establishes neither. In *Selby v. Kann*, 64 App. D. C. 36 (1934) a woman caught her heel in something, fell, looked back, saw a small rip in carpet. Such rip might have been caused by the fall, or caused the fall. This court held that such equivocal evidence established nothing. The Supreme Court of the United States, *Gunning v. Cooley*, 281 U. S. 90, 94 (1930), 74 L. Ed. 720, 724; in a negligence case, the court held that a mere scintilla of evidence is not enough, and that where evidence is all on one side on any one issue, or overwhelming as to leave no room for doubt, peremptory instruction is warranted. This case reiterated the principle of law that in a tort case, if the plaintiff's evidence is as consistent with the hypothesis of negligence, as with lack of negligence, the proof establishes neither.

On Oct. 18, 1948, Case 9492, *Dickins v. International Brotherhood of Teamsters*, etc., this court reiterated the principle that an equivocal statement proves nothing. This court stated "We do not agree that the nature of the article conclusively showed malice in its author." On the same page 5 of its opinion, this court quoted from *National Disabled Soldiers League v. Haan*, 55 App. D. C. 243, 248; 4 F. (2d) 436, 441: (1925) as follows:

"* * * if the language of the communication and the circumstances attending its publication by the defendant are as consistent with the non-existence of malice as with its existence, there is no issue for the jury, and it is the duty of the trial court to direct a verdict for the defendant."

The Actual Cirmustances of Arrest.

It is submitted that that the plaintiff, by his own testimony, has unequivocally established that it was the officer who arrested him on October 2, acting solely in the exercise of the discretion conferred upon him as an officer. (App. 11 A, 12 A, 15 A). True, the defendant, — after the plaintiff had been arrested and placed in the back of the scout car by the officer — came out into the street, and said something to the policeman driving the car — while at the car door, which the plaintiff could not hear.

Apparently the court, in permitting the case to go to the jury, thought this was evidence of causing the arrest of plaintiff, although admittedly he did not know what was said. (App. 24 A). The court made reference to the equivocal statement of the boy witness, and to the fact that defendant had a conversation with the police officer "at or about the time he was taken into custody", and further stated "And you can take both of them — and I am not talking about what credibility the jury should give to it — but isn't it evidence?" (App. 24 A)

The equivocal statement of the boy has already been covered.

The "That would not be enough" (App. 24 A) testimony of the plaintiff concerning the defendant having had a conversation with the officer driving the car, which the plaintiff could not hear, proves absolutely nothing. Nothing added to the said equivocal statement, would not be any more evidence — adding up "both" — than the single equivocal statement of the boy.

If an "inference" may be drawn from the incident of the defendant's having conversed with one of the officers in the car, it is equally as logical to "infer" that the defendant, seeing the scout car "pick up" the plaintiff, opened the front door of her home at 1812 Ingleside Terrace, went out into the street, was asked to identify the plaintiff, did identify him as her son-in-law, asked what the police were going to do with the plaintiff, was informed that he was being taken to No. 10 precinct, and did not then understand that he was under arrest, as to have anything else "inferred" from that incident.

However, it is contended, that the plaintiff's testimony about defendant's conversation which he admittedly did not hear, proved absolutely nothing.

Some "false arrest" and "malicious prosecution" cases.

No "false arrest" and "malicious prosecution" cases combined into one "action" as in the case at bar, have been found in the District of Columbia. On the contrary, these have always been different causes of action, separately considered by the court.

A few of the "false arrest" or "false arrest and imprisonment" cases are *Prigg v. Lansburgh* (1894) 5 App. D. C., p. 34; *Waters v. Anthony* (1902) 20 App. D. C. 124; *Kinchlow v. Peoples Rapid Transit Co.*, 66 App. D. C. 382 (1937); *C. & P. Tel. Co. v. Lewis* (1938) 69 App. D. C. 191.

Some of the "malicious prosecution" cases which have reached this court, are *Spitzer v. Friedlander*, 14 App. D. C. 556 (1899); *Staples v. Johnson*, (1905) 25 App. D. C. 155; *Slater v. Taylor* (1908) 31 App. D. C. 100; *Pickford v. Hudson* (1909) 32 App. D. C. 480; *Brown v. Selfridge* (1910) 34 App. D. C. 243; *Auerbach v. Freeman*, (1915), 43 App. 176; and *Wolter v. Safeway Stores* (1946) 80 U. S. App. D. C. 357.

There does not appear to be any legal prohibition upon combining the two causes into one "action", but it would appear logical that if the plaintiff elects to do so, he must prove every element of each and both of the two, and the defendant contends in this case, that he proved neither.

The defendant contends that the court erred in failing to direct a verdict for the defendant at the close of the plaintiff's case, and in addition to what has already been said, calls attention to what has been the law with respect to "false arrest" or "false arrest and imprisonment," at least as far back as 1894, in the District of Columbia:

In *Prigg v. Lansburgh*, 5 App. D. C. 34 (1894) suit was brought for false arrest and imprisonment. Prigg, a salesman, appeared to have irregularly handled a transaction, and when asked by Hart, bookkeeper for Lansburgh & Bro. the defendant to explain it said "I don't know; it looks right bad". Prigg, the plaintiff, described his arrest as follows:

"At the time of the arrest I was called down stairs by Mr. Gans, who was manager of Lansburgh & Bro. Mr. Raff was there, and he said to me that it had been reported there was some money missing and asked me to make an explanation. I said I had no explanation to make; that I had a receipt from the cashier. I was asked to go with the officers"

He was taken to Police Headquarters, searched, kept there from one-half to three-quarters of an hour, taken to 6th precinct, put in cell, charged with larceny, kept there till

next morning, carried to Police Court, gave bond, afterwards charged with \$27.00 embezzlement, gave bond, and after a two day hearing was discharged.

It should be noted that the plaintiff in this case was careful to charge only "false arrest and imprisonment" (and not "malicious prosecution"), and the court of appeals, this court, in sustaining the action of the lower court in directing a verdict for the defendants at the close of all evidence, stated:

"Without intending to intimate an opinion as regards the guilt or innocence of the appellant of the offense charged against him, *or to decide that there was probable cause for his prosecution*, we hold that *there is not sufficient evidence in the record to warrant a finding that the appellees actually arrested the appellant or commanded or requested the officer, Raff, to do it*. It is true that facts were reported to Police Headquarters, and Raff came to investigate them. He heard the statements, examined the accused, and made arrest. *There is no evidence to show that he did so at the request or under the persuasion of appellees, or any one of them, and the reasonable inference from all the evidence is that he made the arrest in the exercise of the discretion conferred upon him*, according to the evidence of the chief of police.

"Mere information to the officers of the law by a citizen, tending to show that an offense has been committed and that some one named may be suspected of its commission, is not sufficient, of itself, to warrant the inference that the informer or his agents participated in the unlawful arrest and imprisonment of the accused by the officer."

"When the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of the jury and direct a verdict."

Another early case, *Waters v. Anthony*, (1902) 20 App. D. C. 124, decided by this court, was a suit by Anthony against Waters, clerk in charge, and three other persons

trading as Adams Express Company. A verdict and judgment for \$5340. had been recovered by plaintiff in the lower court against the defendants.

This court noted an "utter absence" of testimony that would implicate the persons owning the Adams Express Company, and held it error for the court to refuse to direct a verdict to that effect.

As to the defendant, Waters, the court said (at p. 130-131):

"More plausible, although scarcely more substantial was the case made at the trial by the plaintiff against the defendant Waters. But even here we think that there was no sufficient evidence to justify a verdict against the defendant. There is no proof whatever that he requested, or caused, or authorized the *arrest* of the appellee nor does it appear that he made any complaint, formal or informal, against the appellee. He had his suspicions. Those suspicions, although unfounded in fact, were not unreasonable under the circumstances. He was approached by the detectives; for it would appear from the record that they sought him, not he them, and in answer to their questionings he communicated his suspicions to them. In this there was nothing improper or unlawful. Thereupon, acting apparently upon their own motion, the detectives arrested the appellee. This is the sum total of the evidence, and it wholly fails to disclose any action of the defendant for which she should be held liable to the appellee."

After reviewing the testimony, the court said: (at p. 132)

"Nowhere does the witness say that Waters requested or even suggested to him to arrest the appellee; it is only his own inference from the conversation between Waters and himself that Waters desired the arrest to be made. We cannot accede to the theory that upon such a statement as this a man should be mulcted to the extent of upwards of five thousand dollars. This was not sufficient evidence to go to a jury; or if it was, a verdict based upon it should have been immediately set aside."

In reversing the judgment, the court said:

"The case, however, is not one wherein a new trial should be awarded. For it must be assumed that the plaintiff has adduced all his testimony; there has been no exclusion of anything offered by him, so far as the record shows. If the testimony adduced is insufficient as the basis for a verdict of a jury in his favor, it would be useless to order a new trial."

"The judgment appealed from is reversed, with costs. And it is so ordered."

It is submitted, that upon the law as laid down in these cases, that even though the plaintiff in this case was basing his complaint or action on "false arrest" alone, he has utterly failed to make out a case. Bearing in mind, however, that the plaintiff's cause of action is a combination of "false arrest" and "malicious prosecution", it is submitted that there was not a scintilla of evidence to substantiate his action for that part of his claim which constituted "malicious prosecution."

The evidence adduced by plaintiff as to "malicious prosecution."

The entire evidence adduced by plaintiff in his case relating to malicious prosecution was his own personal testimony, as follows:

"I came to court on a Saturday morning — and I forget the Judge's name. He exonerated me.

Q. When you say you went to Police Court, did you stand trial there?

A. I stood trial there and was exonerated, because I don't drink — absolutely don't drink.

Q. And you say your ten dollars was returned to you?

A. It was returned to me that Saturday morning."
(App. 13 A)

The action was "Complaint for Damages for False Arrest and Malicious Prosecution." The alleged false arrest, occurred on October 2d, 1946. (App. 2 A)

The alleged "Malicious Prosecution" is said to have occurred three days later, namely on October 5th, 1946. (App. 2 A) So much of the complaint as refers to this charge is quoted from paragraph 3 of the complaint, as follows:

"* * * the defendant wilfully and maliciously, and without probable cause, caused the plaintiff to be * * * put on trial on the 5th day of October, 1946, in the Municipal Court, wherein plaintiff was acquitted."

It is submitted that the foregoing testimony should not be regarded, even as a scintilla of evidence, sufficient to support the part of plaintiff's claim relating to "malicious prosecution".

This court, in *Chapman v. Anderson*, 55 App. D. C. 165, 3 Fed. (2d) 336 in setting forth what was required "to support an action for malicious criminal prosecution" stated that

- (1) the plaintiff must prove the fact of prosecution
- (2) that the defendant himself was the prosecutor, or
- (3) that he instigated its commencement,
- (4) that it was made without probable cause,
- (5) and that the defendant in making or instigating it was actuated by malice,
- (6) and that damages conforming to legal standards resulted to the plaintiff,

taking as its authority for these requirements, the Supreme Court of the United States case of *Wheeler v. Nesbitt, et al.*, 65 U. S. 544; 16 L. Ed. 755, and quoted the same authority for its statement "Malice may be presumed from the lack of probable cause, if not inconsistent with other facts in the case. Lack of probable cause cannot be inferred from the presence of malice."

The plaintiff, in narrating the circumstances of his prosecution three days after his arrest, in his testimony from the witness stand:

- (1) did not produce the written information upon which he was prosecuted in court

(2) did not prove that the defendant was the prosecutor, or

(3) that she instigated its commencement

and did not connect the defendant in any manner whatsoever with the prosecution. Of course he could not offer in evidence the written information upon which he was prosecuted in court without showing that his prosecution was solely the result of an information sworn to by an officer before a prosecuting officer, and that the officer was the one and only witness in the case.

He did not show that the defendant ever had any knowledge at any time as to any prosecution, malicious or otherwise, by any one, at any time.

This court, in *Slater v. Taylor* (1908) 31 App. D. C. 100, in affirming a directed verdict for the defendant in a suit for malicious prosecution, libel, and assault and battery said, at p. 104

“There was no controversy as to the facts in the present case; hence it became the duty of the court, to determine, as a matter of law, the question of probable cause, and a finding of probable cause, if sustained, defeats plaintiff’s action, since want of probable cause, and malice, express or implied, must concur to warrant a recovery. *Spitzer v. Friedlander*, 14 App. D. C. 556”

To the same effect is the ruling of this court in *Brown v. Selfridge*, 34 App. D. C. 243, an action for malicious prosecution in which there was a directed verdict for the defendant:

“Where, in an action for malicious prosecution, the facts are not in dispute, or are clear, it is the duty of the trial court to determine, as a matter of law, the question of probable cause.” (Following *Slater v. Taylor*, 31 App. D. C. 100)

and also the case of *Wolter v. Safeway Stores*, 80 App. D. C. 357 (1946) where at page 358 the court says, con-

cerning the malicious prosecution proceeding, in affirming the action of the lower court in directing a verdict for the defendant:

“* * * if the facts from which the presence or absence of probable cause can be established, are undisputed or clearly established, the question is one of law for the court.”

There was absolutely no dispute of the fact that the plaintiff in the case at bar had been prosecuted, upon what written information he was prosecuted, who was the prosecutor, what witness appeared against him, for what cause, and that there was no malice.

Since no fact was established by plaintiff in support of his claim for malicious prosecution, except the fact that he was tried and acquitted, and since he failed to establish that the defendant had any connection with, or knowledge concerning the proceeding, it is submitted that it was clearly the duty of the court to have directed a verdict for the defendant.

2. The Court Erred in Refusing to Instruct the Jury to Render a Verdict for the Defendant at the Close of the Whole Case.

3. The Court Erred in Submitting the Issues to the Jury.

5. There Is No Substantial Evidence to Sustain the Verdict of the Jury.

Since it is contended that on the whole evidence the court should have directed a verdict for the defendant, it is thought advisable to cover together the 2d, 3d, and 5th points on which it is felt the court erred. Certainly if there were no basis for submitting the issues to the jury, then the jury had not sufficient evidence on which to render a verdict for plaintiff.

THE WHOLE EVIDENCE

As to False Arrest.

In addition to the plaintiff's evidence, already considered, the defendant produced as a witness, Officer Fries of the Metropolitan Police Department. Testifying from records of Radio Scout Car 101, he stated that in response to a call at 10:30 PM Oct. 2, 1946, to Ingleside Terrace, for disorderly drunk, he arrested Mr. Wells, (the plaintiff) (App. 26 A). He stated that Mr. Wells was, in his opinion, in a drunken condition, was placed in a scout car, carried to No. 10 precinct, charged with drunk; that no one asked him to charge plaintiff; that he never saw anyone at that time other than plaintiff as far as he could remember, and that he had never before (the day he was testifying in court) seen the defendant. He stated he was on the passenger side of the car, and that Officer Grafton was driving the car. (App. 26 A) He described the plaintiff at the time of his arrest as "either he was highly nervous or had been drinking quite a bit" (App. 26 A) and as "the average fellow that has had one drink too many". (App. 27 A) as "staggering" or "wavering around", "not walking straight" (App. 27 A) and "not walking like he was going to some definite address". He smelled plaintiff's breath. He further testified of taking the plaintiff to No. 10 precinct. (App. 28 A).

Mrs. Eleanor Pauline Wells testified (wife of plaintiff, but separated from him) that after plaintiff had left the house and went outside (1812 Ingleside Terrace) he "wouldn't leave the front of the house"; that she called police by phone "just to ask to have him move on. And all they said was that they would take care of it." App. 34 A). She stated she called the police from the telephone in the house, that she expected the police "to make him move on", that she wanted to go to bed but was afraid, and that her husband had threatened her innumerable times. (App. 33 A, 34 A, 35 A).

The defendant stated she was home ironing in the basement apartment of her home when her daughter, Mrs. Wells, and Mr. Maher, came back to the house with Mr. Wells about 20 minutes after Mrs. Wells and Mr. Maher had left for the movies. (App. 37 A), and described the plaintiff as follows:

“Well, Lou acted awfully funny that night. I couldn’t understand him. His behavior was terrible. And I couldn’t say whether it was drunkenness or what it was; but he acted so funny that I didn’t know what to do with him. We were afraid of him, and we wanted to get him out of the house as fast as possible, because I was afraid he was going to kill us all.”

She stated that he had never lived at that house, her home (App. 37 A, 38 A). She stated that she did not call the police, but that her daughter Eleanor (Mrs. Wells) did call them. (App. 38 A) Then she testified as follows:

“Q. And did you see the scout car pick him up?
A. Yes. I was standing in the front, because I was watching him walk from the front of the house to the back.

Q. From the front of the house you mean? A. Yes, sir.

Q. And after he had been picked up and he was in the scout car, what did you do? A. I opened the front door and stepped out. I wanted to know what they were going to do with him; so I went down to the scout car. I mean, when they saw me, they stopped. And one of the officers—

Q. On the driver’s side or the passenger side? A. On the passenger side.

Q. Go ahead. A. Because, the way the car stopped, it was on the passenger side. And he said, ‘Lady, do you know this man?’ And I said, ‘Yes; he is my son-in-law.’ But at that time he was in the car already. And I said ‘What are you going to do with him?’ ‘Well,’ they said, ‘we are going to take him to the police station, the Tenth Precinct. And’

he said 'if you want to see him, you will have to go over there and see him.' I said I thought they were going to take him home.

Q. And they pulled away? A. And they pulled away. (App. 38 A)

Q. And after he was placed under arrest, you talked to the officer standing right beside the scout car? A. After he was in the scout car.

Q. Yes. A. I didn't know he was under arrest. I didn't know what they were going to do with him." (App. 39 A)

As to Malicious Prosecution.

In addition to the evidence in the form of testimony of the plaintiff heretofore quoted and commented upon, the defendant introduced into evidence the formal paper or information, Case No. 19154 (App. 42 A, 43 A, 44 A), entitled "Information, *District of Columbia vs. Louis A. Wells*, endorsed "Witnesses R. H. Fries, Officer, Oct. 5, 1946, Plea Not Guilty, Judgment Not Guilty," etc., which charges that on the 2d day of October, 1946, defendant was intoxicated, etc., and contains this jurat:

"Personally appeared R. H. Fries this 5 day of October, A. D. 1946, and made oath before me that the facts set forth in the foregoing information are true and those stated upon information received he believes to be true. (s) Richard Barton,
Asst. Corpn. Counsel in and for the
District of Columbia."

Officer Fries, testified that he remembered that the information was filed, the case set for Oct. 5th, a plea of not guilty entered, and judgment of not guilty. (App. 27 A)
Concerning the manner of handling radio calls.

Of interest as to police procedure is the testimony of Officer Fries (App. 32 A) that when radio calls are received, they originate through telephone or verbal complaint, and that the call in this case "must have come

either by telephone or by someone coming to the station house with a verbal complaint.” (App. 32 A) But how many different persons handle a call or complaint between the time it reaches a police station, and the time it finally reaches an officer in a cruising radio car, is not known. Definitely the routing of the complaint in this case is not shown, and it can only be conjectural as to how it was handled, or what was done after Mrs. Wells phoned to the police to have the plaintiff move on. “All they said was that they would take care of it.” (App. 34 A)

Court's denial of motion for directed verdict on the whole evidence.

In response to a request of the defendant for a directed verdict on the whole evidence the court said:

“I will have to deny that, for the same reasons I did before.”

It is respectfully submitted that, in addition to the reasons already set forth herein in connection with the first assignment of error on the part of the court, that the evidence on the whole case shows:

Without any dispute, but entirely corroborated by the plaintiff, by Officer Fries, and by the defendant, is the fact that the “false arrest” complained of was made by Officer Fries as a result of a routine radio scout car call received by him in a routine manner in connection with his duties as a police officer. All testimony as to the detailed circumstances of the arrest is in complete harmony. As in *Prigg v. Lansburgh*, 5 App. D. C. 34, from all the evidence it is apparent that the officer made the arrest of the plaintiff in the exercise of the discretion conferred upon him as a police officer. No fact or facts have been adduced to show that the defendant arrested the plaintiff, or that the officer acted at the request or under the persuasion of the defendant, or that the defendant participated or assisted in the arrest with the officer.

With respect to the "malicious prosecution" it is submitted that not a scintilla of evidence was produced anywhere in the case showing that the defendant was the prosecutor, that she instigated the prosecution, or that she had any knowledge of the prosecution of the defendant on October 5, 1946, or that there was to be a prosecution at any time. The evidence on the whole establishes conclusively through the testimony of the plaintiff himself, and the testimony of the police officer, Fries, together with the actual information which was the basis for the prosecution and which was sworn to and filed Oct. 5, 1946 by Officer Fries, and in connection with which prosecution he was the only witness. The facts established by this evidence show, unequivocally

- (1) That Officer Fries was the only prosecuting witness,
- (2) That he instigated the prosecution by swearing to an information on Oct. 5, 1946 concerning the incident of Oct. 2, 1946.
- (3) That he had probable cause to do so as an officer of the law
- (4) That in making or instigating the charge the officer was not actuated by malice but simply handling a routine case in a routine manner.

It is repeated, that on the whole evidence, in this "action" wherein the plaintiff charged both "false arrest" and "malicious prosecution", the evidence adduced was wholly insufficient to support either of the two elements of his complaint, and it was plainly the duty of the court, under the authorities hereinbefore cited, to direct a verdict for the defendant on the whole evidence in the case.

4. The Court Erred in Refusing to Instruct the Jury As Requested by Defendant, Either in the Specific Language Suggested, or in Language to Cover the Substance of the Specific Language Suggested; and in Refusing to Correct or Complete Instructing the Jury Pursuant to Law.

AS TO THE REFUSAL TO INSTRUCT IN THE SPECIFIC LANGUAGE SUGGESTED, OR IN LANGUAGE TO COVER THE SUBSTANCE OF THE SPECIFIC LANGUAGE SUGGESTED.

The following is taken from the record App. 45 A:

“MR. SHEEHAN: And, Your Honor, I think we are entitled to an instruction along the line that I have just read.

THE COURT: What instruction? Tell me again.

MR. SHEEHAN: ‘The jury are instructed if they find that the defendant furnished the police with information to the effect that the plaintiff was suspected of some unlawful act, this is not sufficient to warrant any inference that the defendant in any way participated in the arrest and imprisonment of the plaintiff.’

THE COURT: I will deny that, and you may have an exception.” (App. 45 A)

The court said, after completing its first charge to the jury, “Is there any charge that counsel for either party thinks I should give that I have not, or clarification, other than those I have already ruled upon?” Whereupon Counsel for the defendant requested and received permission to approach the bench, and the following transpired at the bench. (App. 50 A)

“MR. SHEEHAN: I know Your Honor ruled on that, and the refusal to giving the charge in the language I had proposed. I understood you would give some charge to cover this point of law here (handing book and indicating therein), as peculiarly applicable to this case.

THE COURT: No; I ruled that I thought the charge was adequate on that; that they had to find it was caused by the defendant.

MR. SHEEHAN: Very well, Your Honor. The point I had in mind was that the mere fact that a call had been made was not sufficient to warrant the inference—

THE COURT: I will tell them frankly that I think in this case, to find for the plaintiff, they must find that she called or caused to be called the police officers, asking them to arrest the plaintiff on the charge of drunkenness.

MR. TOOMEY: Your Honor, on that point, I think in your previous instructions you laid emphasis on the words "solely" and "only." I think that covered it amply.

THE COURT: I will charge them that; *but that is all I will do.* (Italics supplied)

MR. SHEEHAN: There was one other point I didn't mention, Your Honor.

THE COURT: What is that?

MR. SHEEHAN: And that is that the termination of the action in favor of the plaintiff does not necessarily mean—

THE COURT: You have argued that to them. *I am not going to argue the case.* That is one of the elements that must be shown. (italics supplied)

MR. SHEEHAN: Very well, Your Honor. I wish to have those exceptions go in." (App. 51 A)

The requested instruction in the language suggested (App. 45 A) was something to which the defendant was entitled. The substance of same has been held correct over and over again, from 1884 down to the present time, and reiterated over and over again by this court, as recently as in the case of *C. & P. T. Co. vs. Lewis*, 69 App. D. C. 191; 90 F. 2d, 424 (1938), in the following language:

"Mere information to the officers of the law by a citizen, tending to show that an offense has been committed and that some person named may be suspected of its commission, is not sufficient, of itself, to warrant the inference that the informer or his agents participated in the unlawful arrest and imprisonment of the accused by the officer." *Prigg v. Lansburgh*, 5 App. D. C. 30, 38; *Waters v. Anthony*, 20 App. D. C. 124;

Kinchlow v. Peoples Rapid Transit Co., 66 App. D. C. 382, 88 F. 2d 764; certiorari denied, 301 U. S. 693, 57 S. Ct. 926, 81 L. Ed. 1349.

The substance of the instruction tendered in the language shown by the record (App. 45 A) was denied; the court also refused any instruction covering this point of law as shown by the record above (App. 51 A), although this case was tendered to the court at the bench and the law pointed out to the court in *C&PTCo. v. Lewis*, 69 App. D. C. 191, at p. 192.

This, in and of itself, is believed to be reversible error. In view of the fact that the court, on nebulous evidence, a scintilla of evidence, or whatever it may be considered,—the evidence of the boy witnesses to the effect that defendant is alleged to have stated that she caused the arrest of the plaintiff—this instruction as tendered, or an instruction embodying this point of law would appear to be something that the defendant, in the circumstances, was clearly entitled to have given the jury by the court.

This court, in reversing a verdict and judgment for plaintiff based on malicious prosecution, in the case of *Pickford v. Hudson*, 32 App. D. C. 480, at p. 481, stated the case could be disposed of without consideration of each of the numerous errors assigned, namely one assignment of error on the part of the court in refusing to instruct the jury in the language quoted on page 484 of this court's opinion in the case. At p. 486, it laid down this principle of law:

“Where a citizen acts in good faith in assisting the officers of the law to apprehend and bring to the bar of justice those guilty of crime, or against whom probable cause exists of the commission of crime, such action is to be commended, and not condemned. Hence, where a state of facts exists, such as is here disclosed, a defendant, before being mulcted in damages, is entitled to have all his rights protected and safeguarded

before the jury, by clear and definite instructions as to the law applicable to the case made out by the evidence."

And again, this court, stated in *Carrol v. Parry*, 48 App. D. C. 453, in reversing a verdict and judgment for damages in a false arrest case, at p. 462:

"While the rights of the citizen are to be carefully safeguarded, to the end that he may not be deprived without reason either of his liberty or good name, "public policy demands that every citizen be alert to prevent infractions of the law, and, where the law has been broken, to use his best efforts to bring the guilty to account." *Simmons v. Sullivan*, 42 App. D. C. 528".

The tendered instruction, or the substance of same, is believed to have been erroneously refused, that such refusal constitutes error, and in and of itself, if there were nothing else in the case, would warrant a new trial.

AS TO REFUSING TO CORRECT OR COMPLETE INSTRUCTING THE JURY PURSUANT TO LAW.

The court erroneously started off by instructing the jury as follows:

"Members of the jury, I am sure you understand the character of this *action*. It is one in which the plaintiff seeks to recover damages from the defendant, for the alleged malicious prosecution by the defendant of the plaintiff." (App. 45 A)

and then proceeded to define the elements of malicious prosecution. (App. 46 A) Consistent with this erroneous instruction as to the action being a "malicious prosecution" case, the court said:

"Should you find for the plaintiff, you would then consider the amount of damages to which he is entitled. In such action as this, the law presumes that some damage has been suffered. If you find for the

plaintiff, if you find the four elements of malicious prosecution, you may determine what a person, situated as the plaintiff is situated, would suffer in damages by reason of humiliation, or mental suffering and anguish, and the distress that would flow from such *malicious prosecution*." (App. 47 A) (italics supplied)

At App. 50 A, of the record the court said:

"If, on the other hand, you do not believe it has been shown by a fair preponderance of the evidence that there was *malicious prosecution* by the defendant of the plaintiff, as I have described that to you, it will be equally your duty to find your verdict in favor of the defendant."

The record at App. 51 A, as hereinbefore quoted shows the court as saying "I will charge them that; *but that is all I will do*." and as saying to defendant's counsel after just having cut him off twice "*I am not going to argue the case*." Defendant's counsel certainly did not request or expect the court to "*argue the case*" but did expect to have the opportunity of presenting suggested instructions to correct or complete instructing the jury pursuant to law.

It is respectfully submitted that the court's instructions concerning "four elements" did not embody the requirement of the Supreme Court of the United States as set forth in *Wheeler v. Nesbitt*, et al, 65 U. S. 544, 16 L. Ed. 765, which this court has followed in the case of *Chapman v. Anderson*, 55 App. D. C. 3 F. (2d) 336, at p. 168 of this court's report, that not only the "four elements" be proved, but that as well, the plaintiff must establish

"that the defendant was himself the prosecutor, or that he instigated its commencement."

The "four elements" as charged may well have given the jury the direct impression that even though the officer who

swore to the information, who was the sole prosecutor and prosecuting witness,—nevertheless the plaintiff could recover for “malicious prosecution,” with damages for “malicious prosecution” as defined by the court.

Furthermore, it appears that the court contradicted itself as to the cause of action which the jury were considering, for, after having charged the jury as to “malicious prosecution” as hereinbefore set forth at page App. 52 A of the record it charged the jury as follows:

“To find for the plaintiff, against the defendant, in this cause, you must find from the evidence—and of course that means you can make reasonable inferences from facts you have found from the evidence—that the defendant did call or caused to be called the police officers, asking them to arrest the plaintiff on the ground of drunkenness.”

This is tantamount to telling the jury it was a “false arrest” case instead of a “malicious prosecution” case as the jury had just been told. The court at no place explained or defined to the jury “false arrest” or “false imprisonment”.

In view of what transpired in the effort of defendant’s counsel to get the instructions corrected or completed (App. 51 A) it seemed futile to attempt to do more.

It is respectfully urged that the failure and refusal to instruct as hereinbefore set forth, and the confusing, incomplete, and incorrect instructions as to the nature of the action which the jury was considering, constitutes reversible error.

6. The Verdict and Judgment Are Excessive.

It is believed that under any condition, the \$2,500 verdict and judgment are excessive, and under any and every circumstance of this case, particularly the lack of clarity in the court’s instructions, any verdict should be set

aside. There is no segregation of the amounts awarded for "false arrest" or for "malicious prosecution", and there is no proof of any special damages, and no claim made for punitive damages. Even if this verdict were assessed under clear and correct instructions of the court, the amount of \$2,500 damages would appear, under all conditions, to be grossly excessive and based on passion and prejudice. Plaintiff was under arrest approximately five hours and attended police court but once, on Oct. 5, 1946 under a charge carrying a requirement of but \$10 collateral.

7. The Court Erred in Denying the "Motion of Defendant to Set Aside Verdict of Jury, and to Have Judgment Entered in Accordance with the Defendant's Motion for Directed Verdict; or, in the Alternative, That Defendant Be Granted a New Trial."

This motion was duly filed (App. 6 A) pursuant to Federal Rules of Civil Procedure Rule 50 (b) making provision for the filing of such a motion.

Both under the evidence adduced by the plaintiff alone, and under the whole evidence in the case, the court clearly had a duty to grant the motion for directed verdict for the defendant. It erred in failing to correct its error by setting aside the verdict of the jury and entering judgment for the defendant. Also, it erred in considering the motion only as a motion for a new trial.

The evidence and the law, heretofore reviewed in this brief, would have justified the court in acting favorably toward the defendant by entering judgment in her favor; or, in the alternative, by granting a new trial.

IN CONCLUSION

It is respectfully submitted from all the evidence in the case, and from the law applicable to this case, that the judgment should be reversed. It is also believed that the court would be warranted in following the same procedure that it followed in *Waters v. Anthony*, 20 App. D. C. 124, at p. 134, by reversing the judgment with costs.

All of which is respectfully submitted for the consideration of this court.

EMMETT LEO SHEEHAN

WILLIAM J. BATRUS

ROBERT C. HILDALE

Suite 223, Bond Building

Washington, D. C.

Attorneys for Appellant,

Nellie Reichard

A P P E N D I X

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1 A

United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9983

NELLIE REICHARD, *Appellant*,

VS.

LOUIS A. WELLS, *Appellee*.

Appeal from the District Court of the United States
for the District of Columbia

JOINT APPENDIX TO BRIEFS

110 Filed Dec 30 1946 Charles E. Stewart, Clerk

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
DISTRICT OF COLUMBIA

Holding a Civil Term

LOUIS A. WELLS
104-E. Raymond Ave.,
Alexandria, Va.
Plaintiff,

vs.

NELLIE REICHARD
1816 - Ingleside Terrace, N. W.,
Washington, D. C.
Defendant.

CIVIL ACTION NO. 38260

*Complaint for Damages for False Arrest
and Malicious Prosecution*

The complaint of LOUIS A. WELLS shows unto this Honorable Court the following:

1. That he is a citizen of the United States and a resident of the State of Virginia, City of Alexandria.
2. That the defendant NELLIE REICHARD is a citizen of the United States and a resident of the District of Columbia.
3. That on the 2nd day of October, 1946, the defendant wilfully and maliciously, and without probable cause, caused the plaintiff to be arrested by the Metropolitan Police Department on a charge of drunkenness, restrained of his liberty by being placed in jail, and subsequently put to trial on the 5th day of October, 1946, in the Municipal Court, wherein plaintiff was acquitted.
4. That plaintiff was grossly injured in his good name and reputation by the false charge that plaintiff was guilty

111 of drunkenness, when the defendant had no probable
cause to believe same was true; said defendant well
knowing said charge was false, but contriving and
maliciously intending to ruin the good name and reputation
of the plaintiff by said false and malicious charge and
prosecution.

5. That by reason of said false and malicious charge,
and arrest and detention, without probable cause, plaintiff
has suffered severe mental and nervous shock, and has been
injured in his good name and reputation throughout the
District of Columbia and all parts of the United States of
America, to the extent of Ten Thousand Dollars (\$10,-
000.00).

WHEREFORE, the premises considered, plaintiff de-
mands:

1. Judgment against the defendant in the sum of Ten
Thousand Dollars (\$10,000.00), together with costs of this
action, and

2. Such other and further relief as to the Court seems
just and proper.

A Trial by jury is demanded.

Louis A. Wells

Louis A. Wells

M. Edward Buckley, Jr.

M. Edward Buckley, Jr.

Attorney for Plaintiff

406 - 5th Street, N. W.,

Washington, D. C.

REpublic 0274

• • • •

112 Filed Jan 20 1947 Charles E. Stewart, Clerk

Answer

The defendant answering denies each and every allega-
tion contained in paragraphs 3, 4 and 5 of the complaint.

WHEREFORE the defendant demands judgment dismissing the complaint, with the costs of this action.

Robt. C. Hildale

Robt. C. Hildale

Attorney for Defendant

1400 L St. N. W.

Washington, D. C.

Telephone National 8674

* * * *

113 Filed June 23 1947 Charles E. Stewart, Clerk

Pretrial Proceedings

STATEMENT OF NATURE OF CASE:

This is an action in which the plaintiff seeks to recover damages from the defendant for the alleged false arrest and malicious prosecution by the defendant.

Plaintiff claims that the defendant, his mother-in-law, caused him to be arrested and taken into custody by an officer or officers of the Metropolitan Police Department upon the charge of being drunk. The plaintiff denies that he was drunk or had been using intoxicating liquor in any amount, whatsoever. He, further, asserts that the defendant had no probable cause to believe that he was drunk and she caused such arrest maliciously and without any cause or excuse. The plaintiff, further, claims that after being held in custody for some hours he was prosecuted on the charge of being drunk at the instance of the defendant, of which charge he was acquitted. He asserts that there was no probable cause for his prosecution by the defendant or at her instance and that the defendant was guilty of malicious prosecution in her actions toward this plaintiff. Plaintiff claims that he has been humiliated and has suffered injury to his reputation and has suffered severe mental and nervous shock for all of which he is entitled to recover damages.

The defendant denies that she caused the arrest of the plaintiff or that she caused any prosecution of the plaintiff on the charge of being drunk or otherwise.

STIPULATIONS: By agreement of counsel for the respective parties, present in Court, it is ordered that the subsequent course of this action shall be governed by the following stipulations unless modified by the Court to prevent manifest injustice:

DATE June 23, 1947
Jas. W. Morris
Pretrial Justice

Leo J. Michaloski
Buckley & Michaloski
Attorney for Plaintiff
R. C. Hildale
Attorney for Defendant

* * * *

114 Filed Feb 5 1948 Harry M. Hull, Clerk

Verdict and Judgment

This cause having come on for hearing on the 4th day of February, 1948, before the Court and a jury of good and lawful persons of this district, to wit:

Beatrice Iskowitz	Alice M. Young
Audrey S. Gross	James W. Isaac
Elna T. Howard	Eugene M. Parker
Daniel F. Urbanek	David Altman
Edward J. Lewis	Ellen L. Northedge
Dean A. Lyon	Anna C. O'Donnoghue

who, after having been duly sworn to well and truly try the issues between *Louis A. Wells*, plaintiff, and *Nellie Reichard*, defendant, and after this cause is heard and given to the jury in charge, they upon their oath say this 5th day of *February, 1948*, that they find the issues aforesaid in favor of the plaintiff and that the money payable to

him by the defendant by reason of the premises is the sum of *Twenty Five Hundred Dollars*

Wherefore, it is adjudged that said plaintiff recover of the said defendant the sum of *Twenty Five Hundred Dollars* together with costs.

Harry M. Hull, Clerk;
By George A. Watts
Deputy Clerk.

By direction of
Justice Morris.

* * * *

115 Filed Feb 14 1948 Harry M. Hull, Clerk

Motion of Defendant to Set Aside Verdict of Jury, and to Have Judgment Entered in Accordance With Defendant's Motion for Directed Verdict; or, in the Alternative, That Defendant Be Granted a New Trial.

Now comes the defendant, by her attorneys of record, and moves the court to set aside the verdict of the jury and enter judgment for the defendant in accordance with defendant's motion for a directed verdict interposed at the close of plaintiff's case at the trial of the above-entitled case; or, in the alternative, that defendant be granted a new trial, and for reason therefor states as follows:

1. The court erred in refusing to instruct the jury to render a verdict for the defendant.
2. There was no substantial evidence to sustain the verdict of the jury.
3. The court erred in submitting the issues to the jury.
4. The verdict is contrary to law.
5. The court erred in refusing to instruct the jury, as follows:

"The jury are instructed if they find that the defendant furnished the police with information to the effect that

the plaintiff was suspected of some unlawful act, that is not sufficient to warrant any inference that the defendant in any way participated in the arrest and imprisonment of the plaintiff."

as requested by the defendant.

116 6. The court erred in refusing to instruct the jury as to the substance of the law that mere information to the officers of the law by a citizen tending to show that an offense has been committed and that some person named may be suspected of its commission, is not sufficient, of itself, to warrant the inference that the informer or his agents participated in the unlawful arrest and imprisonment of the accused by the officer.

7. The verdict is excessive.

8. After the verdict was rendered, defendant received information as to new evidence, as embodied in "Affidavit of Melese Johns" attached hereto, which new evidence she could not have discovered by the use of reasonable diligence in time for use at the trial, and which newly discovered evidence in and of itself is grounds for a new trial.

9. And for such other and further reasons as may be presented to the court upon the hearing of this motion.

Robert C. Hilldale

Robert C. Hilldale, Albee Bldg.

Emmett L. Sheehan,

Emmett L. Sheehan,

Bond Building,

William J. Batrus

William J. Batrus,

Bond Building

Attorneys for Defendant.

* * * *

117 Filed Apr 23 1948 Harry M. Hull, Clerk

Memorandum

Morris, J. Subsequent to a trial, in which a verdict was rendered for the plaintiff, defendant moved for a new trial, alleging error on the part of the Court concerning instructions to the jury, insufficiency of evidence, and newly discovered evidence. A hearing was had and subsequent memoranda submitted by counsel for both parties.

The Court is of the view that there is sufficient evidence to justify the jury, under the instructions of the Court, in finding that the defendant did procure the arrest and prosecution of the plaintiff upon the charge of drunkenness; that the plaintiff was acquitted on such criminal charge; and that the action of the defendant was done with malice. The Court is not of the view that the verdict is excessive. It has not been shown that the alleged newly discovered evidence could not have been secured by the exercise of proper diligence before the trial, nor is it clear that such evidence would probably affect the verdict, if a new trial were granted. The Court is of the view that the instructions given to the jury were substantially accurate, and that the giving of the instructions granted and the refusal of the instructions denied did not constitute such error as to justify the granting of a new trial.

For the reasons stated, the motion for new trial is denied.

Jas. W. Morris

Justice.

April 23, 1948.

• • • •

120 Filed May 21 1948 Harry M. Hull, Clerk

Notice of Appeal

Notice is hereby given this 21st day of May, 1948, that *Nellie Reichard, the defendant*, hereby appeals to the

United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 23rd day of April, 1948, in favor of *Louis A. Wells* against said *Nellie Reichard*

Emmett L. Sheehan
William J. Batrus
Emmett L. Sheehan & Wm.
J. Batrus
223 Bond Building
Washington, D. C.
and Robert C. Hildale
Robert C. Hildale
303 Albee Building
Attorneys for Defendant

3

Louis Allen Wells,

the plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. TOOMEY:

Q Would you state your full name to His Honor and the jury, please? A My full name is Louis Allen Wells.

Q And, Mr. Wells, where do you live? A I live at the present time at 3024 Fifteenth Street, Northwest.

Q Where are you employed, Mr. Wells? A At
4 the National Radio Institute, at 1356 U Street, Northwest.

Q How long have you been so employed? A I have been so employed fourteen years, the 28th day of December past.

Q And what is your position with that company? A My position with that company is steam engineer, electrical engineer, and building superintendent.

• • • •

6 We went back to my mother-in-law's, and my mother-in-law didn't want me to go in. We went down to the basement where my mother-in-law was ironing, and this man went down there, with my wife and my mother-in-law.

7 And when we got down there, I told my mother-in-law, I says, "This is the fellow she has been going with all the time, while I was in the hospital and all."

So my mother-in-law spoke up and said, "I gave her the right to go with him."

Well, anyway, I went on out. When I got out, I asked the taxicab driver to send me down a policeman, and gave him a quarter for his trouble. Then I went over to Policeman Emerson's home; I wanted Policeman Emerson to make a record that I caught my wife with a man.

Q Who is Policeman Emerson? A Policeman Emerson is almost directly across the street from my mother-in-law's home. So I went over there; I went across the street. I knocked on the door, and some people came by, and some people told me the policeman lived right near there, and I didn't know which place it was.

So I knocked on the door and asked the woman; and the woman spoke, very broken English, and told me it was the second door. And I went there and asked his mother-in-law, and his mother-in-law said he and his wife were out bowling that night on the Police team.

And then I called my private detective I had watching my wife, from their home, and I couldn't get him. I came on out, and when I came out of there, and started across the street, I got over to my mother-in-law's side of the place, I got over to mother-in-law's side of the street; 8 and this police scout car came along throwing a searchlight up on the property, and all up on the porches of the houses. And when they saw 1816 Ingleside Terrace, they stopped.

I walked off the sidewalk, thinking it was the policemen I had sent for. I walked off the sidewalk, and walked over.

And, not the driver of the car, but a policeman — anyhow, I saw the policeman here a while ago — and that policeman, he didn't do a thing, without letting me say a word or anything; he just pulled the door open and he had three drunken men in the back seat, and they were carrying on terrible. And the policemen were carrying on with the men too, carrying on awful. And, in fact, when we hit Fourteenth and Monroe, the driver of the police car got halfway across the street, and I thought a private car was going to hit him.

Anyway, he grabbed me by the shoulder and started to pulling me in.

* * * *

Q Mr. Wells, will you go back to Policeman Emerson's home and cover the story from there?

* * * *

9 THE WITNESS: Yes, sir. The policeman pulled me into the car, with three drunken men.

BY MR. TOOMEY:

Q This was where? A At 1816 Ingleside Terrace, right in front.

Q Was that in the street? A That was in the middle of the street, after I had walked off the sidewalk to the car. Neither policeman had gotten near me. Then the policeman grabbed me by the shoulder and pulled me in there. And I told him I wanted to see him; and he wouldn't tell me what he was pulling me in for, but just pulled me in.

And my mother-in-law came out in the street and said something to the policeman at the car door.

Q Did you hear what she said? A No, I am
10 sorry, I didn't, because the drunken fellows in the back of the car was carrying on so, and I was in there and almost down on the floor, with the four of us in there.

Q I see. A And my mother-in-law came out and said something to them. Then they turned around and took me up and over to Monroe and toward number 10 precinct.

* * * *

A Number 10 precinct. When we got to number 10 precinct, they marked us all out of the car. They had to help carry them, to a certain extent; they held on to them, anyhow. I walked perfectly straight, and got behind the rest of them.

11 Then they stripped me of everything I had, even down to my money and everything. They wouldn't tell me what the charge was. If they had told me what the charge was, I would have asked for a doctor. But they refused even to talk to me.

They took me back and threw me in a cell with a man so drunk that he couldn't stand on his feet. But he had pulled off his shoes. He was the filthiest, dirtiest thing I ever came in contact with, and he deliberately laid on the iron bed and put his feet up in my face and held his feet in my face. He didn't even have feet in his socks.

Then at twenty minutes to four, I asked them if they wouldn't even let me call my lawyer.

Q What time was it when you got to the police station?
A I would say roughly 10:20 to 10:30.

Then I tried to get them to tell me what the charge was, and they wouldn't do it. Then it went on until it was approximately twenty minutes of four. I think I looked at the clock on the wall. And it was twenty minutes of four when they brought me out.

They took my money and took ten dollars from my money before they even gave it to me, and gave me a receipt for ten dollars collateral.

* * * *

12 And I said, "You can't charge me for being drunk, because I don't drink." I says, "That was a frame-

up, to get me out of the way, so the man could get out of the house."

And I told him, I says, "I am going to appear; I am going to go to court with it, for that ten dollars."

I did; I came to court on a Saturday morning—and I forget the Judge's name. He exonerated me.

* * * *

Q When you say you went to Police Court, did you stand trial there? A I stood trial there and was exonerated, because I don't drink — absolutely don't drink.

Q And you say your ten dollars was returned to you?

A It was returned to me that Saturday morning.

* * * *

15 BY MR. TOOMEY:

Q Did you suffer any physical reaction?

16 THE WITNESS: It helped make me more nervous.

THE COURT: It made him nervous, that is right.

BY MR. TOOMEY:

Q As a result of this difficulty you found yourself in, were you forced to lose any time at your work? A Yes; I did lose some time. I had to take afternoons off. I worked in the mornings, and the company insisted I take afternoons off to help get myself straightened out; and I continued on to the doctor.

Q Over how long a period of time were you forced to take these afternoons off? A Roughly, some three to four weeks. And there probably would be an afternoon now and then in between I would be able to stay.

Q Reflecting back for a moment to your visit to
17 your mother-in-law's home on that evening, who was present in the house? A At that time, nobody but the man I caught my wife with, and my mother-in-law and my wife.

Q Did anyone come in while you were there? A No, sir.

Q Did you make any effort to see either of your children while you were there? A I did.

MR. SHEEHAN: That is objected to as being immaterial, Your Honor. It has nothing to do with the false arrest, whether he did or did not see his children.

MR. TOOMEY: I think it might be material, Your Honor.

THE COURT: Anyway, it has been asked and answered. I don't think it is particularly material; neither do I think it is particularly irrelevant. It is what happened on that occasion.

* * * *

19 BY MR. TOOMEY:

Q Were any remarks directed to you by any other people, with respect to your having been arrested?

A Yes. They made a remark saying that; they made a remark to the effect that they never knew of me to ever drink, and what had I done, to take to drinking all of a sudden. And they asked me —

* * * *

BY MR. TOOMEY:

Q With a view towards that, I want to ask this question of the witness: Over how long a period of time
20 did such remarks continue? A They still do, to a certain extent.

MR. TOOMEY: Very well, sir. I think that is all.

* * * *

BY MR. SHEEHAN:

24 Q Mr. Wells, when you referred to your wife, did you refer to your wife at the time of this incident, in October of 1946? A Yes, sir.

* * * *

28 BY MR. SHEEHAN:

Q I believe you told us, when the scout car got
29 there that night about 10:30 p.m., the officer simply

opened the door and forced you in. Is that it? A He opened the door and pulled me in. He opened the door and reached around this way, and reached around and pulled me into the car.

Q Was that on the driver's side or the passenger side? A On the passenger side.

Q And Mrs. Reichard approached the car on the driver's side? A Correct.

Q And she said something, you don't know what it was? Is that what you testified? A She did. She stated something.

Q I am asking you — if I understand your direct testimony — she spoke to the driver, and the driver pulled you in the car? A She spoke to the driver, and the driver pulled me into the car. That is exactly what happened.

Q And you don't know what was said? A I don't know what was said, no, sir.

MR. SHEEHAN: That is all.

Redirect Examination

BY MR. TOOMEY:

Q Mr. Wells, on the night of October 2, 1946, did you or did you not consider the daughter of Mrs. Reichard as your wife? A I did.

MR. TOOMEY: That is all.

* * * *

Mrs. Betty Falwell,

called as a witness on behalf of the plaintiff, and being first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. TOOMEY:

Q Mrs. Falwell, will you speak in a loud voice so that the ladies and gentlemen of the jury can hear you, and so that His Honor can hear you.

Would you state your full name, please? A My name is Betty Falwell.

THE COURT: How do you spell the last name?

THE WITNESS: F-a-l-w-e-l-l.

BY MR. TOOMEY:

Q And where do you live, Mrs. Falwell? A 1825 Ingle-side Terrace, Northwest.

Q And are you employed? A Yes, I am.

Q Where? A The L. Frank Company.

31 Q Mrs. Falwell, referring back to the evening of October 2, 1946, do you remember anything of an unusual nature happening that night? A Well, yes, Mr. Wells here —

Q Just a moment. You do? A Yes.

Q Do you know this gentleman seated here?—the plaintiff? A Well, I just know him by sight, and by him coming to my door; that is all.

Q Very well. What did happen that night? A Well, that evening he came over and rang my door bell; and of, course —

Q About what time was that? A I am not real sure, but it was before 10 o'clock in the evening, I think.

Q Go right ahead. A I didn't take special notice of the time. But it was in the evening, between dinner and bed time.

Q Go right ahead; what happened? A Well, he came and rang my doorbell and asked if my son-in-law was home.

Q Who is your son-in-law? A He is a Metropolitan Policeman.

32 Q What is his name? A Franklin P. Emerson. And he asked if he was in; and I told him no, that he was out. So then he told me that he had been arrested for being drunk, and he wanted to talk to Mr. Emerson to have him testify and as to whether he was intoxicated or not. So when I told him that my son-in-law was out, he stood at the door and talked to me for a few minutes.

And, of course, his two children — I don't know their family. I wouldn't even know them if I saw them. But their two children lived across the street. I don't even know which house they lived in, but they lived across the street, and they used to play with my little granddaughter. And they are two very lovely, well-mannered children. And he asked me if I thought that he was intoxicated; and I told him no, definitely not.

Q Well, now, wait a moment, Mrs. Falwell. To clarify this in my own mind, did Mr. Wells come to your door that evening and ask for your son-in-law? A Yes; he wanted to speak with him.

Q What did he say he wanted to talk to him about? A Well, he wanted him to see whether he was intoxicated or not, because it seems everyone thought he was, or someone had thought that he was.

* * * *

33 BY MR. TOOMEY:

Q How many times did you talk to Mr. Wells around October 2nd? A Well, I talked to him several times.

* * * *

34 But neither time he talked to me, he was not drinking.

* * * *

38 *Franklin Louis Wells,*

a minor, called as a witness on behalf of the plaintiff and being first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. TOOMEY:

Q Frank, state your full name, please. A Franklin Louis Wells.

Q Speak in a loud voice so these ladies and gentlemen can hear you. A Franklin Louis Wells.

Q And are you going to school now, Frank? A Yes.

Q Where? A Cook — H. B. Cook.

Q Frank, did you know your father had been arrested? A Yes.

Q How did you know that? A He told me, on the telephone.

* * * *

39 BY MR. TOOMEY:

Q Did you ever talk to your grandmother about your father having been arrested? A No.

Q You did not? A No. She said things to me, and things like that; but we never had a real talk.

Q What did your grandmother say to you? A Well, she told me that she had had Daddy arrested, and that was about all, you know.

Q Did she tell you what she had had your father arrested for? A No, they didn't tell me that, until Daddy told me.

Q When did she say she had had your father arrested? A Oh, she didn't say it until about two, maybe two days after Daddy told me.

Q When did Daddy tell you? A One night — I forget what day it was — anyway, we had just gotten in bed, and he phoned us and told us. I think it was the day after; yes, it was the day after he had —

* * * *

40 (To the reporter:) Read the last the boy was saying, when he was interrupted.

THE REPORTER (reading): "I think it was the day after; yes, it was the day after he had —"

THE COURT (to the witness): Now, you had not finished that; it was the day after he had been what?

THE WITNESS: He had been arrested.

BY MR. TOOMEY:

Q How did you say you learned he had been arrested?
 A He told me over the telephone. That night, right after he had been arrested, they didn't tell me about it; and when he phoned, he told me, and they wouldn't let me talk to him. And when I went down to the basement, they shut the door and held the door, and I couldn't get back up to talk to him.

Q Was he in the house that night? A No.

Q Did your grandmother tell you when he had been arrested? A No.

* * * *

41 MR. TOOMEY: My question meant did she tell him at what time he had been arrested.

THE WITNESS: No.

BY MR. TOOMEY:

Q How many times did your grandmother say she had had your father arrested? A Once.

* * * *

THE COURT: (To the witness) Did you answer the question?

THE WITNESS: Yes.

THE COURT: What was the answer?

THE WITNESS: Yes.

* * * *

42 BY MR. TOOMEY:

Q How many times did your grandmother say she had had your father arrested? A Once.

* * * *

BY MR. TOOMEY:

Q What, exactly, was said to you about your father having been arrested? A Well, they didn't tell me; and then after he told me, well, Eleanor — that is my mother — she told me about him being arrested once. Then Nellie — that is my grandmother — she told me too.

Q She told you what? A She said he had been drunk that night, and she had him arrested. And they both said he was drunk.

Q Did she tell you that once, or several times? A Several times.

Q But she only told you, she only made reference
43 to his having been arrested once? A Yes.

* * * *

Cross Examination

BY MR. SHEEHAN:

Q Your name is Frank? A Yes.

* * * *

Q How many people did you talk to about this case this noon? A Oh, I don't know. It wasn't very many.

Q Well, you say it wasn't very many. How many
44 was it, Frank? A Oh, I don't know.

Q I am talking about this noon, now, this recess.
A I don't quite understand what you mean.

THE COURT: He wasn't down here before lunch, was he?

THE WITNESS: No.

THE COURT: When did you first come down here?

THE WITNESS: I didn't get down here until quarter of 2, something like that.

BY MR. SHEEHAN:

Q And whom did you talk to about the case, at or about that time?

THE WITNESS: Just Daddy and Paul.

THE COURT: You talked to your Daddy and to Paul?

THE WITNESS: Paul Schwering.

BY MR. SHEEHAN:

Q And what was said between you and your Daddy about the case? A Oh, he just told me the case was going to come up, and there was going to be a jury; and the Judge wouldn't decide it, that there was a jury.

Q That was about a quarter of 2 today? A Yes, sir.

Q And did you talk to your father about what you would say when you got on the stand? A He didn't tell me what to say.

45 Q Did you tell him what you were going to say?

A Oh, a little bit; I told him what I remembered.

Q He asked you? A Yes, sir.

Q And did this gentleman talk to you, too, about what you were going to say when you got on the stand? A No; he talked to Paul.

Q Who is Paul? A That is our landlord.

Q You say they had your father arrested? A Yes.

Q And, by that, you mean your mother? A Yes, sir.

Q Isn't it a fact that your mother called the police that night?

MR. TOOMEY: I object.

THE COURT: Wait just a minute. You put an improper question there. He never said they both had him arrested. He said they said he was drunk. I think you must be more careful in putting the question to him.

MR. SHEEHAN: Your Honor, I understood him to use that very term.

THE COURT: Let us go back and get it from the record.

(To the reporter) Read all of the direct testimony of the boy.

46 (The reporter having read from the direct examination of the witness, as directed:)

MR. SHEEHAN: Very well, Your Honor.

BY MR. SHEEHAN:

Q You say your father did not come to the house at all that night? A No.

Q Your father did phone you, did he not? A Yes, sir.

Q Didn't there come a time when he took you over to Alexandria and showed you a jail cell? A No.

Q That didn't happen? A No.

Q Did you talk to Frank about what you were going to say when you got on the witness stand today — no, did you talk to your brother. What is your brother's name? A Joe.

Q How old is Joe? A Nine.

Q Did you talk to him about what you were going to say? A No.

Q Did you talk to him at all since you have been here?

A No; he didn't come.

47 Q And you didn't come here today until quarter of 2? Is that it? A That is right.

Q And how did you get down here, Frank? A By taxi.

Q In response to a phone call from your father? A Yes, sir.

Q Did you know at any time before that that you expected to testify here today? A No.

Q Just what did your grandma say? Will you use her words as nearly as you can in telling about this event?

* * * *

THE WITNESS: No, I can't remember what her words were.

THE COURT: All right.

BY MR. SHEEHAN:

Q You can't remember anything she said? Is that right? A No.

Q Not a single word she said about it? A I
48 know what she said, but I don't know the exact words.

Q Substantially what did she say? A Well, she didn't say much. First she said that no, she didn't. Then she said yes. And then my mother out there — she is out in the hall — she said that she, after they found out about the suit, she said she called the policeman. And then grandmother, over there, then she started denying it again, and sometimes she would say yes, and sometimes she would say no.

Q Your mother was there when your grandmother said that? Is that it? A Yes, some of the times.

Q And was she there the first time your grandmother said anything about that? A I don't think so.

Q Didn't you say a moment ago that she was right in the hall?

THE COURT: He means in the hall out here, now.

(To the witness) Isn't that it?

THE WITNESS: Yes.

BY MR. SHEEHAN:

Q What room was this in, Frank? A I think either in the front bedroom, in the front, or else in the room
49 where the telephone is.

Q And who else was there? A Just us.

Q By "us" you mean who? A Grandmother and me.

Q Nobody but grandmother and you? A No.

Q Now, the next time she said it, who was present? A I think my brother was, and that was all, you know; that was all, then.

Q There never was a time your grandmother said it when your mother was there? Is that it? A No, not that I can remember.

MR. SHEEHAN: I think that is all.

Redirect Examination

* * * *

52 MR. SHEEHAN: At this time, Your Honor, I wish to move for a directed verdict. There has been absolutely no testimony developed that this party caused the arrest of this man, and no evidence whatever except the statement —

THE COURT: It isn't very strong, but there is certainly evidence. He said this defendant had a conversation with the police officer, at or about the time he was taken into custody. That would not be enough. Then you have testimony of this boy that the defendant says she caused his arrest. And you can take both of them — and I

am not talking about what credibility the jury should give to it — but isn't it evidence?

MR. SHEEHAN: He doesn't place the date, Your Honor.

THE COURT: Oh, no. That is only an inference.

MR. SHEEHAN: He could have been arrested a half a dozen times.

THE COURT: No; he testified he was arrested only once. And on your motion to direct a verdict, I must
53 take as true not only everything said, but every favorable inference that can be drawn.

What have you as a reason on which I could direct a verdict?

MR. SHEEHAN: I think it calls for a specific fact.

THE COURT: Oh, nothing has to be done specifically. It can be done by inference.

MR. SHEEHAN: He has in the complaint that this incident was on the second of October 1946.

MR. TOOMEY: That is true.

MR. SHEEHAN: Where has he shown the incident the boy has talked about was October 2, 1946?

THE COURT: He testified he was only arrested once.

MR. SHEEHAN: He doesn't know, except from hearsay, that he was arrested at all.

THE COURT: The plaintiff?

MR. SHEEHAN: I say the corroboration given here is the only testimony connecting this defendant with this.

THE COURT: That is right — that, plus the circumstance of the defendant having the conversation with the police officer at the time he was arrested. I am not saying the jury ought to believe that, but I am saying is that evidence.

MR. SHEEHAN: Very well, Your Honor.

THE COURT: Motion denied.

54 (Counsel having returned to the trial table:)

MR. SHEEHAN: Officer Frees.

Accordingly—

Randolph Howard Frees,

called as a witness on behalf of the defendant, and being first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. SHEEHAN:

Q Will you state your full name, please? A Randolph Howard Frees.

Q And you are a member of the Metropolitan Police Department attached to No. 10 Precinct? A That is correct.

Q Are these records in your custody, sir? A Yes.

Q And you are responsible for their return to the precinct? A That is correct.

Q I show you a record here, the front of which is Scout Car Record 44, and I show you a record and ask you if you have a —

What is this entry here I am pointing to, relating to 1816 Ingleside Terrace, Northwest? What does that mean or indicate to you, sir? A On October 2, 1946, while
55 working in Scout 101, working 4 to 12 p.m., at 10:20 p.m. I received a call to 1816 Ingleside Terrace, Northwest, for disorderly drunk. In answer to that call, I made one arrest, case 173 on the arrest book, for that date.

Q Do you have the arrest book there, sir? A Yes, I do.

Q Would you refer to that, please? A Case 173, booked on October 2, 1946, at 10:40 p.m., under the name of Louis Allen Wells — W-e-l-l-s — 104 Raymond Avenue, Alexandria, Virginia, charged with drunk, Officer E. P. Grafton, complainant — myself, Officer Frees, as officer. \$10 posted; to court on October 5, 1946.

Q Now, having looked at that record, does that refresh your recollection with respect to any incident that occurred that evening? A As I remember the call to 1816 Ingleside Terrace, for disorderly drunk, as far as I can remem-

ber, on arrival, I observed a person in front of that address, a man, which I believe is sitting here now, and later I testified as the Mr. Wells, who was in my opinion in a drunken condition. He was placed in the scout car and carried to No. 10 and charged with drunk.

Q Did anyone ask you to charge him at that time, sir, in front of the premises? A I have never seen anyone at that time, other than the defendant, and another person who was in the car ahead of him.

56 THE COURT (to the witness): When you say "the defendant," do you mean this lady over here, or this gentleman?

THE WITNESS: I mean the plaintiff, Your Honor. I am a little mixed up — Mr. Wells.

BY MR. SHEEHAN:

Q Do you recall seeing this lady (indicating the defendant) at any time before today? A As far as I can remember, I have never seen the lady before.

Q And what side of the car were you on, sir? A I believe I was the passenger that night.

Q And who was driving, sir? A Officer Grafton.

Q And who was in the car besides you two officers, when you came up to 1816 Ingleside Terrace, if you recall? A Another prisoner.

Q And did you have any difficulty at all in getting back to the station and booking these prisoners in a routine manner? A No; they were both routine cases. I remember talking to Mr. Wells, asking him where he lived, and I couldn't say he told me Virginia. I don't remember. He told me where he lived at that particular time; but from the way he talked at that time, either he was highly nervous or had been drinking quite a bit, or just what it was I don't know. I mean, he answered my questions, but he wanted to give me a little argument about it, which is natural.

57 Q With respect to sobriety or lack of sobriety, will you describe his condition as you observed it? A Well, I

would say he was the average fellow that had had one drink too many. I mean, he wasn't a violent case. We have a lot of them that like to fight.

Q Do you recall the disposition of that case, or are you able to tell it, after looking at that record? A Yes; I remember the paper, the information, that was filed in D. C. Court. The case was set for October 5th, and a plea of not guilty entered, and judgment of not guilty before the Judge.

Q As far as you were concerned, this was just a routine call? A It was a routine call?

Q A routine police transaction? A One of about six or seven hundred a year.

MR. SHEEHAN: That is all.

Cross Examination

BY MR. TOOMEY:

Q How many was that a year, Officer? A Around six or seven hundred.

58 Q Now, then, you testified that this was a routine call over the radio? A That is right.

Q To your car? A Yes. We operate on the radio.

Q At the time that you saw this party in front of, in the vicinity of, 1816 Ingleside, where was he? A On the sidewalk, approximately in front of 1816.

Q What was he doing? A Well, when I observed him, as far as I can remember, I would say he was walking on the side walk.

Q What brought your attention to him? A We had a call for that particular location.

Q Was there anything peculiar about him that attracted your attention to him? A I would say he was staggering.

Q You would say he was staggering? A Wavering around.

Q Do you remember that he was staggering? A Well, I would say he was not walking straight.

Q How many other passengers did you have in the scout car at that time? A Two other passengers and myself.

Q Two other passengers and yourself? A My
59 partner, and another defendant.

Q And you were sitting on which side? A I was on the passenger's side.

Q When you took this man into custody, did you smell his breath? A I certainly did.

Q Did you say anything to him? A I talked to him.

Q What did you say? A I asked him where he lived, which is routine, and how much he had been drinking, which is a routine question.

Q Did he answer as to where he lived? A As far as I remember, he told me where he lived. I couldn't tell you what he told me; I don't remember.

Q But you do remember he was staggering? A I remember our attention was drawn to him. He was in front of the place where we had to call, and the way he was walking up the street, he wasn't walking like he was going to some definite address. He was more or less loitering around.

Q How long ago was this, Officer? A Approximately a year and a few months.

Q And do you and your partner in the scout car relieve one another as driver and passenger? A When
60 regularly assigned, we either have one driver or two drivers.

Q At that time was either of you assigned as the regular driver? A I can check the scout car book and I think I can find out.

Q But you do remember you were seated in the passenger's side? A I am pretty sure I was the passenger.

Q Do you remember any lady approaching the car? A I haven't seen any lady.

Q You haven't seen any lady? A Not that I remember.

Q You do not remember that? You don't remember talking to anyone else at all? A No.

Q May I see, in the record book — A The call for the night?

Q No, the arrest. A (Indicating) Case 173.

Q And where does this night begin? A This night goes back, as of 8 a.m.

Q When did you come on duty? A Four p.m.

Q Let us turn to 4 p.m. A At 4:05 the first case was booked, case 122.

61 Q How many arrests for drunkenness had you made that night?

* * * *

THE WITNESS: I can't tell you without checking the arrest book.

BY MR. TOOMEY:

Q You do not remember.

Would you check the arrest book? A I will check it.

Between that time — 4, 5, 6 — six drunk cases that particular evening, as far as I can see.

Q Very well, sir.

I refer you to the number of Mr. Wells. What is his case number again, please? A 173.

Q What time was he placed under arrest? A
62 He was booked at 10:40.

Q What time was case No. 172 placed under arrest? A 172 was 10:38.

Q What time was the next one? A 10:35.

Q So 174 was also a drunk case? A No — 171, 172, and 173.

Q Very well; and 171 was placed under arrest at what time? A At 10:35.

* * * *

BY MR. TOOMEY:

Q Was case No. 171 a drunk case? A Drunk case; 172 a drunk case, and 173 a drunk case.

Q Do you remember, in case No. 171, whether or not you were seated on the passenger's side of the car at the time

you made that arrest? A I was sitting on the passenger's side, evidently, the whole night.

Q Do you remember in case No. 171 whether the
63 prisoner was staggering when you saw him? A I would say yes, he was staggering.

Q Officer, do you remember seeing the prisoner in case No. 171 staggering? A I have never seen a drunk that he wasn't staggering.

Q Officer, have you ever arrested a man for drunkenness who was prone on the street? A Not unless he was passed out.

Q Answer it, please: Have you arrested a man for drunkenness who was prone on the street? A Yes, sir.

Q Do you remember whether or not case No. 171 prisoner was prone on the street when you arrested him? A I don't know.

Q In case No. 172, did the prisoner give you his address, and do you remember it?

MR. SHEEHAN: Do you mean without referring to the notes? — or with the aid of the book? How is your question intended?

BY MR. TOOMEY:

Q Without the aid of your book, or — may I preface it with one question?

Is the asking of the address of the prisoner a routine question? A It is.

Q Do you remember whether or not prisoner No.
64 172 was able to give you his address? A Some do and some don't. I don't know whether he was or not.

Q Do you remember whether the prisoner in case No. 172 was able to give you his address?

* * * *

THE WITNESS: No, I don't remember.

BY MR. TOOMEY:

Q Officer, after you placed Mr. Wells under arrest that evening, where did you go? A To No. 10.

Q Directly to No. 10? A Directly.

Q Officer, in case No. 171, were you the arresting
65 officer? A Yes, I was.

Q In 172, were you the arresting officer? A My partner was the arresting officer.

Q In 173, you were the arresting officer.

In the scout car that night you said there was yourself, the driving officer, and one passenger, another intoxication case? A That is right.

Q Which number case was that? A Apparently it would be 172, that was booked two minutes before Mr. Wells was booked.

Q Where did case number 171 come in?

A Apparently we picked him up before we received a call to Ingleside Terrace. Apparently he was picked up on the way into the station. He could have been brought to the station by a cab driver, and I was assigned as arresting officer.

Q So, Officer, when you testify there were only two passengers in the car besides yourself, there well could have been passengers in the car besides yourself, at that time? A Not as far as I remember.

Q Officer, I ask you, where did the third intoxication case come in? A I don't remember.

66 Q Then, Officer, when you say you rode directly from the Ingleside Terrace address to number 10, you well could have been mistaken? Is that correct? A We don't ride around and patrol the area with prisoners in the back of the car.

Q Officer, you are not sure how many passengers were in the car at the time you placed Mr. Wells under arrest, are you? A I told you, as far as I remember, we had one prisoner and two officers in the car, before we picked up Mr. Wells.

Q And, Officer, by the time you got back to number 10 precinct, you had three prisoners, is that correct? A Mr. Wells was the third prisoner.

Q Officer, between the time you left Ingleside Terrace and reached number 10 precinct, you had another prisoner besides the one you had at the time Mr. Wells was placed under arrest, after Mr. Wells? Is that correct? A We had two prisoners before Mr. Wells.

Q So there were three passengers in the car, at the time Mr. Wells was placed under arrest? — the other officer and the two prisoners? Is that correct? A There was four of us in the car when Mr. Wells was placed under arrest.

Q Officer, when you received calls over the radio,
67 how, if you know, does the sending station receive those calls? A By telephone, by verbal complaint.

Q So this call, according to the police system, must have come either by telephone or by someone coming in the station house with a verbal complaint? A That is correct.

MR. TOOMEY: That is all.

* * * *

Edwin P. Grafton,

* * * *

Direct Examination

BY MR. SHEEHAN:

Q Your name is what, sir? A Private Edwin P. Grafton.

68 Q Member of the Metropolitan Police Department? A That is right.

Q And you were on October 2, 1946? A That is right.

Q Referring to the night of October 2, 1946, did you have any independent recollection of participating in an arrest of this Mr. Wells here, independent of any record, I mean? A No, only of the record; that is all, sir.

MR. SHEEHAN: May we stipulate the record of number 10 precinct shows case number 173 was booked at 10:40 p.m.? It is Louis Allen Wells, 104 Raymond Avenue, age 49, white, United States Citizen, engineer, male.

* * * *

74 *Mrs. Eleanor Pauline Wells,*

called as a witness on behalf of the defendant and being first duly sworn, was examined and testified as follows:

* * * *

75 *Direct Examination*

BY MR. SHEEHAN:

Q State your full name, please. A Eleanor Pauline Wells.

* * * *

79 BY MR. SHEEHAN:

Q When did you move in with your mother, after that action? A I moved in with my mother in August, 1946.

Q And coming now to the night of October 2nd, will you tell us what happened? A Yes. I was on my way to the movies with another man. We were, oh, about a block and a half from the house. And this cab kept going up and down the street. I think it passed us three times in the one block. And the cab stopped and he got out of it and he started running towards me. Well, he told me if he ever saw me with anyone else at all, he would shoot me to cripple me, not to kill me, and I would have the rest of my life to think it over. So he had his hands in his pocket, and I thought he meant it. So I said we should all go back to the house, instead of having a scene on the street. And he was agreeable, and turned and walked in back of us, and the three of us walked back to the house.

Well, oh, he blew his top. He was shouting and cursing and carrying on, and tried to wake the two boys up to tell them I was no good.

Q That is, after he had entered the house? A Yes; we were in the house. And mother told him he was not to go in the boys' room and wake them up. And he wanted to

call the police on our phone, and mother said, "No, you can't use my phone; go to a drug store."

So he pushed her around a little bit, and finally he went out. And he said he was going to call the police, and Mother said, "I understand a policeman is living across the street somewhere," but she didn't know which house, just that there was one across the street.

So Mr. Wells went out, and I think he went to one house, and they evidently told him where the policeman lived; and he told me, after that, the policeman's name was
81 Emerson; and he used their phone.

Then he came back, and he just wouldn't leave the front of the house. Well, he told me he wouldn't leave, before he went out; that he was going to stay there. So he walked around to the back, and to the front, and stood there. And I was afraid to go to bed.

Well, we all were afraid to go to bed. So Mr. Colisando, the lawyer in Alexandria, told me before he did do something that I should call the police, or I should go to the police station, at least to have it on the record that he had threatened me.

So I called the police, that is all, just to ask to have him moved on, to make him go home. And all they said was that they would take care of it.

Q You explained to them what had transpired? A I said he had threatened me, and my lawyer had suggested I call the police.

Q Will you tell a little more of how he carried on in the house? A Well, he just carried on. He shouts anyhow.

* * * *

82 THE WITNESS: And Mother tried to keep him out of the boys' room. He just pushed her around and pulled her along. He wanted to get in to wake Franklin. And Mother took him by the arm and said "Go on outside." And he finally went out, and that is when he finally went out and called from the Emersons'.

MR. SHEEHAN. That is all.

Cross Examination

BY MR. TOOMEY:

* * * *

83 Q I believe you stated that you saw this cab riding up and down, when you went out with this other man. A Yes.

84 Q And then the plaintiff got out of the cab? A That is true. It was a Yellow Cab.

Q And what did he say to you when he got out? A He just ran down the street and said "Ah, I have caught you." That is all.

Q And you thought that was very funny? A Well, he didn't catch me doing anything but walking down the street.

Q With whom were you walking down the street? A Is that necessary?

Q It is. A Mr. Maher.

Q And who is Mr. Maher? A Someone I know.

* * * *

BY MR. TOOMEY:

Q Just a moment, madam.

And upon your return to the house, you testified, I believe, that the plaintiff acted in a very loud fashion. A That is quite true.

Q Did he wake up any of the children? A No
85 he didn't wake up the children.

Q I believe you testified he made an attempt to awaken Frank? A That is right. He kept calling Franklin.

Q Did he go in Franklin's room? A I think he did get the door open, and Mother pulled it shut.

Q Was he calling in a right loud voice? A Yes, he was calling in a loud voice.

Q Pursuant to these actions, I believe you testified you called the police? A Yes, I did.

Q Where did you call? A From the phone in our house.

Q Where did you call?

THE COURT. Do you mean, what number?

BY MR. TOOMEY:

Q What number did you call? A I called the number in the front of the book, and they gave me the number of No. 10 Precinct. I don't remember what it is, now.

Q And what did you say? A Just that my husband was out front and wouldn't leave the front of the house, and my lawyer had told me to call the police; he had
86 threatened to kill me, and would they please make him move on; I wanted to go to bed, and I was afraid.

Q When did your husband threaten you? A Oh, innumerable times, even when we were together; and afterward he called me on the phone and said he was going to get me.

Q And you had never gone to the police before? A No.
MR. TOOMEY: That is all.

* * * *

87 *Mrs. Nellie Reichard,*

the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. SHEEHAN:

Q What is your name, please? A Nellie Reichard.

Q Are you married, single, or a widow? A I am divorced.

Q And what do you do for a living? A Just now I have a rooming house.

Q And was that your occupation the 2d of October, 1946? A Yes, sir; but at that time I had worked, too, on the outside.

* * * *

88 Q And your daughter works? A Yes, sir. She goes to school, to be able to support herself later on.

Q Mrs. Reichard, tell the Court and the jury about this incident of October 2d, 1946. A Well, it was my day off; and we met this Mr. Maher. * * * And he said "I am staying home tonight." And Eleanor said something about going to the movies, and I said "All right."

And I started doing my ironing, and I thought they went to the movies, to the early show, when in about 20 minutes when they came back, and Mr. Wells came with them.

Q And then what happened? A We have an apartment down in the basement, and that is where I was ironing, and the children were in bed. So he brought them downstairs and said, "You see, that is what she is running around with."

And he cursed the other man and called him all other kinds of names, and accused me of asking Eleanor to leave him so she could run around with other men in my house. And I tried to quiet him down, because I said that wasn't so.

89 Anyway, he carried on and went upstairs and went in the bedroom and said to Frank Junior to get up, and "Look what your mother is running around with."

But I got him by the arm and he came out with me. And he said he was going to call the police to have us all arrested, and wanted to use my telephone, to which I said no, if he wanted to call the police to have me arrested, he could go outside and get a telephone.

Then I did tell him there was a policeman living across the street, and he went out and I locked the front door.

Q Mrs. Wells, could you state whether or not from what you observed he had been drinking or otherwise? A Well, Lou acted awfully funny that night. I couldn't understand him. His behavior was terrible. And I couldn't say whether it was drunkenness or what it was; but he acted so funny that I didn't know what to do with him. We were afraid of him, and we wanted to get him

out of the house as fast as possible, because I was afraid he was going to kill us all.

Q He wasn't living at that house at that time? A No, sir; he was living at 104 Raymond Avenue, Alexandria, Virginia.

Q Has he ever lived at that house? A No, never.

Q That is your home? A That is my home.

90 Q Did you call the police, Mrs. Reichard? A No, sir.

Q Who did call? A His wife, Eleanor.

Q And did you see the scout car pick him up? A Yes. I was standing in the front, because I was watching him walk from the front of the house to the back.

Q From the front of the house, you mean? A Yes, sir.

Q And after he had been picked up and he was in the scout car, what did you do? A I opened the front door and stepped out. I wanted to know what they were going to do with him; so I went down to the scout car. I mean, when they saw me, they stopped. And one of the officers—

Q On the driver's side or the passenger side? A On the passenger side.

Q Go ahead. A Because, the way the car stopped, it was on the passenger side. And he said, "Lady, do you know this man?" And I said "Yes; he is my son-in-law." But at that time he was in the car already. And I said "What are you going to do with him?"

"Well," they said, "we are going to take him to the police station, the Tenth Precinct. And," he said,
91 "if you want to see him, you will have to go over there and see him." I said I thought they were going to take him home.

Q And they pulled away? A And they pulled away.

Q Now, Mrs. Reichard, did there ever come a time when you told Franklin you had caused his father's arrest? A No, never, because I didn't want the children to know anything about this at all.

MR. SHEEHAN: That is all.

Cross Examination

BY MR. TOOMEY:

* * * *

92 Q Did you ever see the plaintiff take a drink?

A Yes, he has had a drink at home.

Q Have you ever seen the plaintiff in an intoxicated condition? A No, I have never seen him intoxicated.

Q That evening the plaintiff came to your home, you say while he was there he did go into the children's room and open their door? A Yes, sir; he just busted right in.

Q He just busted right in and shouted? A But I went right after him. But what I mean, he was so funny that night, that I was able to take him out of the room as quickly as he went in, and he came out with me as soon as I asked him to leave the boys' bedroom; and they didn't wake up.

Q And then he left the house, supposedly to go to a telephone? A After all the fuss, he did. And I
93 led him to the front door; and as soon as he stepped out, I locked the door.

Q And he did go out? A He went.

Q You didn't have to shove him out? A No.

Q And after he was placed under arrest, you talked to the officer standing right beside the scout car? A After he was in the scout car.

Q Yes. A I didn't know he was under arrest. I didn't know what they were going to do with him.

* * * *

Louis Allen Wells,

the plaintiff, returned to the stand and was examined and testified further as follows:

Direct Examination

BY MR. TOOMEY:

Q Mr. Wells, did you ever threaten the life of
94 your wife? A No, sir; I did not.

Q Mr. Wells, did you ever strike your wife? A
No, I have never struck her. When she has struck at—
oh, I am sorry.

MR. TOOMEY: I believe that is all.

Cross Examination

BY MR. SHEEHAN:

Q Didn't you tell Mrs. Reichard you were going to kill
them all? A Absolutely not.

Q Did you tell your wife you were going to shoot her
so as to cripple her, and she would have a long time to
think of it? A Absolutely not.

Q You did not? A Absolutely not, under oath.

Q We know you are under oath.

THE COURT (to the witness): Everything you say is
under oath.

THE WITNESS: Absolutely, I did not.

THE COURT: All right.

BY MR. SHEEHAN:

Q Mr. Wells, how did you get the boys? A The boys
came to me.

95 Q After you—A When I came home from work,
they were at my house.

MR. TOOMEY: Your Honor, I think this opens some-
thing new.

MR. SHEEHAN: I will withdraw it and ask the jury
to disregard it.

MR. TOOMEY: That is all.

MR. SHEEHAN: That is all.

THE COURT: Step down, Mr. Wells.

(The witness left the stand.)

MR. SHEEHAN: That is all, Your Honor.

THE COURT: Are there any requested instructions?

MR. SHEEHAN: Yes, sir.

THE COURT: Suppose I let the jury go out, while we discuss what you propose to say to me.

(At the bench, the jury having left the courtroom:)

MR. SHEEHAN: Your Honor, Mrs. Reichard said he grabbed her and started to bump her head against the wall.

THE COURT: What do you want me to do?—Have you put that on for surrrebuttall?

MR. TOOMEY: If he puts that on, I will have to put Mr. Wells back on to rebut it.

THE COURT: If you want me to open it up, I will open it up.

What about prayers?

96 MR. SHEEHAN: I would like to have a directed verdict for the defendant.

THE COURT: I will have to deny that, for the same reasons I did before.

MR. SHEEHAN: For the reason that the arrest was shown to be exclusively on the judgment of the officer and not because of anything Mrs. Wells or Mrs. Reichard said to him—the arrest and the prosecution. And neither did Mrs. Reichard in any way participate in the arrest.

The evidence shows affirmatively that the only person responsible for the arrest is the arresting officer, who did so because of the condition in which he observed Mr. Wells, and for which he conceived it to be his duty as an officer to place him under arrest; and that the prosecution was by the officer and solely by the officer.

THE COURT: Just state it. Don't argue it. You can do that to the jury.

MR. SHEEHAN: Well, I am stating it. And that the record shows, of the Police Court, shows that no one participated in the prosecution except the arresting officer.

That with respect to the allegation of maliciousness which is contained in here, there has been shown absolutely

no malice of any kind, or nothing from which the jury could infer malice.

As I understand, Your Honor rules—

97 THE COURT: I think there is evidence to show bad feeling on the part of both of them. I don't know how much should be believed about it, any more than I know who caused the arrest. But that is for the jury to decide, as I rule.

MR. SHEEHAN: The record shows affirmatively the officer was responsible alone for the arrest.

THE COURT: You have said that three times.

MR. SHEEHAN: Very well, Your Honor.

THE COURT: The motion is denied, for the reasons stated.

What instructions are requested?

* * * *

MR. SHEEHAN: If Your Honor please, I am not going to offer any more testimony; but I would like to have in evidence the record of the police, the prosecution.

98 THE COURT: Is there any objection?

MR. TOOMEY: No objection.

MR. SHEEHAN: That is the information in District of Columbia versus Louis A. Wells.

* * * *

109-A *Defendant's Exhibit #1*

Civil Action No. 38260

Louis A. Wells v. Nellie Reichard Deft. #1

Information

District of Columbia v. Lewis A. Wells

Charges that on 2 day of October 1946 in the D. of C. on Ingleside Terrace N. W., defendant was then and there drunk and intoxicated contrary to and in violation of the

Act of Congress in such case made and provided, and constituting a law of the District of Columbia.

Vernon E. West

Corpn. Counsel

Personally appeared R. H. Fries this 5 day of October, A. D. 1946, and made oath before me that the facts set forth in the foregoing information are true and those stated upon information received he believes to be true.

(s) Richard Barton

Asst. Corpn. Counsel in and for the
District of Columbia

109-B Page 109-B of the record is the reverse side of the information.

Col. 10 No. 19154

at No. 10 Precinct

Judge Casey

Information

District of Columbia

vs.

Lewis A. Wells

Age 49 Color #

Filed Aug 17 1948

Harry M. Hull, Clerk

Intoxication

Witnesses

R. H. Fries

Officer

Oct. 5, 1946

Plea Not Guilty

Judgment Not Guilty

Defendant Discharged

HS

Dismissed (s) WJC

Oct. 5, 46 18155 A DBR 10.00

Received \$10. Oct. 5, 1946 11:26 A. M.

S Louis A. Wells

S L. E. Elmore

Identified by

Filed Oct 5, 1946 10:15 A. M.

Walter E. Bramhall, Clerk of Municipal Court,
Washington, D. C.

Certified a true copy of the original

Walter F. Bramhall

Clerk of

Municipal Court

Washington D C

By E. Homer Brands (k)

Deputy Clerk

* * * *

97-A (REPORTER'S NOTE: Proceedings in this case incident to instructions requested and discussion thereon, all had in the absence of the jury, were not originally ordered to be transcribed and their omission was indicated by the asterisks on page 97 hereof. The following portions of such proceedings have since been ordered:)

* * * *

MR. SHEEHAN: I think we are entitled to an instruction along these lines, that the jury are instructed that if they find that the arrest and prosecution in this case was solely on the responsibility and through the action of the arresting officer, their verdict must be for the defendant.

THE COURT: I will get to that, but let us finish talking about damages. * * *

(To Mr. Sheehan:) On your point, I am inclined to agree with you, that if—state it over again, now that we have gotten to it.

MR. SHEEHAN: "The jury are instructed that if they find that the arrest and prosecution in this case was solely on the responsibility and through the action of the arresting officer, their verdict must be for the defendant."

THE COURT: I think that is right.

* * * *

MR. SHEEHAN: And, Your Honor, I think we are

entitled to an instruction along that line, that I have just read.

97-B THE COURT: What instruction? Tell me again.

MR. SHEEHAN: "The jury are instructed if they find that the defendant furnished the police with information to the effect that the plaintiff was suspected of some unlawful act, this is not sufficient to warrant any inference that the defendant in any way participated in the arrest and imprisonment of the plaintiff."

THE COURT: I will deny that, and you may have an exception.

* * * *

Judge's Charge

THE COURT: Members of the jury, I am sure you understand the character of this action. It is one in which the plaintiff seeks to recover damages from the defendant, for the alleged malicious prosecution by the defendant of the plaintiff.

In order for you to determine the rights of the parties here, you must of course understand what is meant
99 by "malicious prosecution." A malicious prosecution is a criminal prosecution, which was instituted maliciously and without probable cause, and which terminated in favor of the plaintiff. In order to recover, the plaintiff must show:

One, a former, criminal prosecution of the present plaintiff, by the present defendant;

Two, lack of probable cause for the prosecution;

Three, malice—meaning malice on the part of the defendant toward the plaintiff; and,

Fourth, termination of the prosecution in favor of the present plaintiff.

They are the elements that must be shown by the evidence, to constitute a malicious prosecution. Of course, you must understand what those terms mean.

"Malice" is the intentional doing of an act calculated to result in injury to another, without justification or excuse. Malice may be inferred from the lack of probable cause.

"Probable cause" is that which justifies a prosecution, and the lack of which is one of the elements of malicious prosecution. "Probable cause" is such a state of facts and circumstances as would lead a man or woman of ordinary prudence, acting in a reasonable and impartial manner, to believe that the person accused is guilty of the offense charged.

I have given you the elements, what must be
 100 shown, before there can be a recovery by the plaintiff against the defendant. The burden of proof of showing those things rests upon the plaintiff. He must show those elements by what is called a fair preponderance of the evidence. Now, what does that mean? It means the evidence tending to show those things, and each of them, must weigh heavier than the evidence on those issues to the contrary. And, by weighing heavier, I do not mean necessarily the greater number of witnesses; I do not mean necessarily the greater mass of testimony. I mean that the evidence tending to prove those issues must be more convincing to you as to its truth than the evidence to the contrary. Such evidence must be more satisfying to you as to its truth than the evidence to the contrary.

Of course, if it is not as satisfying or convincing as the evidence to the contrary, it does not preponderate. If it is neither more nor less satisfying to you than the evidence to the contrary on those issues, it does not preponderate. But if it is more satisfying and more convincing to you than the evidence to the contrary, then it does preponderate. And if it does, with respect to all of these elements that are involved, the plaintiff has in that event carried the burden of proof. If it does not, he has failed to carry the burden of proof.

There has been testimony concerning the action of a police officer or officers in this case. If the arrest
101 and prosecution of the plaintiff, on the charge for which he was arrested, was due solely and only to the action of the police officer, then it cannot be said that the defendant caused such arrest and prosecution. In that event, of course, your verdict will be for the defendant.

There has been some evidence given in the case touching an annulment proceeding. I don't think there is any doubt but that it has been shown there was an annulment proceeding instituted. I permitted some evidence on the part of both parties, touching the termination of it, the result of it. I should not have done that, for the purpose of showing the result, because the only proper way to show the result of that proceeding—and I so ruled—was by the proceedings themselves, or by certified copies of what the decrees in the case were. I did permit it, for the purpose of showing what animus if any existed between the plaintiff and the defendant, on the question of malice which has been brought in. But you are not to regard the evidence that has been admitted in that respect as showing what the result of such annulment proceeding is, because we don't know. I don't know and you don't know, from the evidence in the case. And, after all, it is not determinative of the question here, except in so far as it shows or fails to show the existence, as I say, of malice in the case.

Should you find for the plaintiff, you would then consider the amount of damages to which he is entitled.
102 In such an action as this, the law presumes that some damage has been suffered. If you find for the plaintiff, if you find the four elements of malicious prosecution, you may determine what a person, situated as the plaintiff is situated, would suffer in damages by reason of humiliation, or mental suffering and anguish, and the distress that would flow from such malicious prosecution, and fix the amount of such damages in such amount as you

feel, in the circumstances and from the evidence, would reasonably compensate him for those injuries.

You may not find damages for any pecuniary losses—loss of salary, loss of money in any fashion—except such as are proved, and none has been proved in this case. So you must confine your consideration of damages, if you come to a consideration of damages, to the elements to which I have alluded.

You are the sole judges of the facts in the case. It is for you to determine what those facts are, by weighing the evidence which you have heard, rejecting such part or parts of that evidence as you do not believe to be true and accurate, and basing your judgment on that which you do believe to be true and accurate. In doing that, you will take your recollection of the evidence; and should that recollection differ from that expressed by counsel for either party, or should it differ from that expressed by the Court, where I may have had occasion during the course of
 103 the trial to state my recollection of the evidence, you will take your own recollection, and not that of counsel or the Court.

When I say you are to weigh the evidence, that means you must be the judges of the credibility of the witnesses, and you are. It is for you to determine to what extent you accept, as true and accurate, testimony that has been given in this case, and what testimony, if any, you reject as not being true or, at any rate, not being accurate. In performing that task you may call to your assistance certain aids and guides which the law, out of long experience, recognizes to be reliable ones, though not necessarily infallible; and therefore you will use them to the extent that in your judgment you think they are helpful to you in arriving at the truth.

For instance, in weighing the testimony of any witness, you may consider the interest, if any, which such witness has in the outcome of the trial, and consider and determine whether or not such interest, if any, has or has

not colored or affected the testimony of such witness.

You may consider the opportunity or lack of opportunity of a witness to have observed and to know the matters about which the witness has testified; the capacity and ability of a witness to have accurately observed, or the contrary; the capacity and ability of a witness to have accurately recollected and accurately related what the witness did observe and know.

104 You may consider the reasonableness or unreasonableness of the testimony of a witness, its probability or improbability, in helping you determine whether to accept that testimony as true and accurate, or otherwise.

You may consider the appearance and demeanor of a witness on the stand—which is simply another way of saying what all of us do in everyday life—you may consider whether or not a person looks and acts as if that person is truthfully, accurately, fully, frankly, and honestly relating what that witness knows to have been so, or the contrary.

If it has been shown that any witness is biased or prejudiced, either for or against either party to this cause, you may consider and determine whether or not such bias or prejudice, if any, has or has not colored or affected the testimony of such witness.

If you believe it has been shown that any witness has testified falsely concerning any material fact in the case, and as to which the witness could not reasonably have been honestly mistaken, you have the right to discard and reject entirely all that that witness has testified to—on the principle that a witness who testifies falsely about one material fact, may testify falsely about others or all or, in any event, such a witness is not sufficiently reliable to compel a jury to base its judgment on the testimony of that kind of a witness.

105 I say you have the right to reject entirely all of the testimony of a witness who has testified falsely concerning one material fact, and you do have such right, but you are not required to do so. You may, if in your

sound judgment you think you should, and if in the interest of truth you think you should, accept as true part of what a witness has testified to, if you believe it to be true, even though you do reject as false other parts of the testimony of that witness—which illustrates the wide latitude the law leaves to your good, sound judgment and discretion as to what weight to give the testimony of such witness.

If after weighing all of the evidence in this cause, as I have said, rejecting such part or parts as you do not believe to be true, and basing your judgment on that which you do believe to be true, you believe it has been shown by a fair preponderance of the evidence, as I have described that term to you, that there was a malicious prosecution by the defendant of the plaintiff, as I have described that to you, and that the necessary elements of that have been established by such preponderance of the evidence, it will be your duty to find your verdict in favor of the plaintiff and fix his damages in such amount as is in accord with the elements of damage that I have explained to you and which would fairly compensate him for such damage.

If, on the other hand, you do not believe it has
106 been shown by a fair preponderance of the evidence that there was malicious prosecution by the defendant of the plaintiff, as I have described that to you, it will equally be your duty to find your verdict in favor of the defendant.

If in the consideration of your verdict you discover that some point I have tried to explain to you has not been made clear, you may let me know through the bailiff and I will try to give you a better and more complete explanation of it.

Is there any charge that counsel for either party thinks I should give that I have not, or clarification, other than those I have already ruled upon?

MR. TOOMEY. The plaintiff is satisfied, Your Honor.

MR. SHEEHAN. I would like to approach the bench.

THE COURT: You may come to the bench.

(At the bench:)

MR. SHEEHAN. I know Your Honor ruled on that, and the refusal to giving the charge in the language I had proposed. I understood you would give some charge to cover this point of law here (handing book and indicating therein), as peculiarly applicable to this case.

THE COURT. No; I ruled that I thought the charge was adequate on that; that they had to find it was caused by the defendant.

MR. SHEEHAN. Very well, Your Honor. The point I had in mind was that the mere fact that a call had
107 been made was not sufficient to warrant the inference—

THE COURT. I will tell them frankly that I think in this case, to find for the plaintiff, they must find that she called or caused to be called the police officers, asking them to arrest the plaintiff on the charge of drunkenness.

MR. TOOMEY. Your Honor, on that point, I think in your previous instruction you laid emphasis on the words “solely” and “only.” I think that covered it amply.

THE COURT. I will charge them that; but that is all I will do.

MR. SHEEHAN. There was one other point I didn't mention, Your Honor.

THE COURT. What is that?

MR. SHEEHAN. And that is that the termination of the action in favor of the plaintiff does not necessarily mean—

THE COURT. You have argued that to them. I am not going to argue the case. That is one of the elements that must be shown.

MR. SHEEHAN. Very well, Your Honor. I wish to have those exceptions go in.

(Counsel having returned to the trial table:)

THE COURT (to the jury). Counsel think perhaps I have not made it sufficiently clear in what I have said; and in order to make certain that I do make it sufficiently clear,

I will give you this amplification of the instruction I
108 have given:

To find for the plaintiff, against the defendant, in this cause, you must find from the evidence—and, of course that means you can make reasonable inferences from facts you have found from the evidence—that the defendant did call or caused to be called the police officers, asking them to arrest the plaintiff on the ground of drunkenness. I mean, in the absence of that sort of a complaint, there wouldn't be the sufficient showing that she caused the arrest to be made.

You may now retire. Choose one of your number as foreman. Consider your verdict. When you have arrived at a verdict—and remember it is your duty to arrive at a unanimous verdict, if you can conscientiously do so—notify the bailiff, and the Court will receive the verdict. You may retire.

* * * *

Jury's Verdict

THE DEPUTY CLERK. Mr. Foreman, have the jury agreed upon a verdict?

THE FOREMAN. They have.

THE DEPUTY CLERK. Do you find for the plaintiff or for the defendant?

109 THE FOREMAN. We find for the plaintiff.

THE DEPUTY CLERK. In what amount, sir?

THE FOREMAN. Twenty-five hundred dollars.

THE DEPUTY CLERK. Members of the jury, your foreman says you find for the plaintiff in the sum of twenty-five hundred dollars. Is this your verdict, so say you each and all? (The jurors responded in the affirmative.)

No. 9983
BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NELLIE REICHARD, *Appellant,*

VS.

LOUIS A. WELLS, *Appellee.*

**Appeal from the United States District Court for the
District of Columbia**

**United States Court of Appeals
For the
District of Columbia Circuit**

LED MAR - 5 1949

Joseph W. Stewart
CLERK

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 9983

NELLIE REICHARD, *Appellant*,

VS.

LOUIS A. WELLS, *Appellee*.

Appeal from the United States District Court for the
District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

The Evidence As To False Arrest

In addition to the testimony of the appellee (plaintiff below) described by appellant (defendant below) in her brief at pages 3 and 4, it is believed material to note that upon cross-examination the appellee testified that appellant spoke to the driver of the Police car and that *afterwards* the driver pulled the appellee into the car. (J. A. 15A) It is further believed material that during the

course of his entire direct and cross-examination, the witness, Franklin Louis Wells, amplified and reaffirmed several times his statement that the appellant had told him she had the appellee arrested. (J. A. 18A et seq.)

Bearing on this matter is the further testimony of the appellee describing the circumstances which brought him into contact with appellant. It appears clearly (J. A. 10A) that at the time of the appellee's visit to the appellant's home, and prior thereto, there was ill feeling, bitterness and personal friction between appellee on one hand and appellant and appellee's wife on the other.

The Evidence As To Malicious Prosecution

Appellant in her brief states that appellee did not offer a scintilla of evidence that the appellant participated in the prosecution in any manner whatsoever. This statement obviously overlooks the substantial evidence produced by appellee showing that appellant had caused or instigated the arrest and consequent prosecution of the appellee.

The Court's Instructions To The Jury

The appellant says that the Court in instructing the Jury did not define "False Arrest". But the Court did in the substance and content of its instructions adequately cover the legal requirements for such a cause of action. (J. A. 47A, 52A)

Although the Court did lay down to the jury in its instructions the four elements of malicious prosecution, it did not limit, directly or indirectly, a finding of the jury for "Malicious Prosecution" but, rather, the only clear inference that could have been drawn by the jury from the instructions was that the damages could flow from "Malicious Prosecution" or "False Arrest" or both.

Nor did the Court contradict its previous instruction concerning malicious prosecution when it instructed the jury that to

“Find for the plaintiff, against the defendant, in this cause, you must find from the evidence—and, of course that means you can make reasonable inferences from facts you have found from the evidence—that the defendant did call or caused to be called the police officers, asking them to arrest the plaintiff on the ground of drunkenness.” (J. A. 52A)

This instruction was a clear exposition of the finding that the jury had to make in arriving at a verdict on the grounds of both “Malicious Prosecution” and “False Arrest”.

SUMMARY OF ARGUMENT

There was substantial evidence to prove both “False Arrest” and “Malicious Prosecution” and the motions of appellant for directed verdicts at the close of the appellee’s case and at the close of the whole case were without merit.

The Court in its instructions to the jury sufficiently and correctly set out the elements of “False Arrest” and “Malicious Prosecution”.

The Court ruled in accordance with law in denying motion of appellant to set aside verdict of the jury and enter judgment in accordance with appellant’s motion for a directed verdict, or in the alternative, to grant appellant a new trial.

ARGUMENT

1. The Court Did Not Err In Refusing To Instruct The Jury To Render a Verdict For The Appellant At The Close Of The Appellee’s Case.

The appellant, in referring to the complaint, cites the case of *Auerbach v. Freeman*, 43 App. D. C. 176, as defining "the charge above made" of "False Arrest" and "False Imprisonment". In the case at bar, however, there was no "False Imprisonment" charged nor was the remedy sought on such ground. A "False Arrest" must be committed under assumption of legal process, whereas "False Imprisonment" may be committed without any pretense of legal authority. 35 C. J. S. 503, Section 2, False Imprisonment. Seemingly, appellant fails to recognize that there is such a distinction between the two causes of action and overlooks the fact that the complaint specifically charges "Malicious Prosecution" and "False Arrest" but not "False Imprisonment".

In the *Auerbach* case, the arrest was for a misdemeanor (petty larceny) without a warrant, there was no identification of the defendant by the complainant, nor was, apparently, the offense committed in the presence of the arresting person. Clearly, it was for these reasons that the arrest was held to be without legal justification and therefore failing in the requirements of "False Arrest" as defined by the Court. Also, it is of paramount importance that in the *Auerbach* case, the complaint was one for "Malicious Prosecution" whereas, in fact, there was no criminal proceeding but only the threat thereof.

In the instant case, however, the appellee did stand trial and was acquitted, the offense complained of was allegedly committed both in the presence of the complainant and the arresting officers, the information filed against appellee was under competent legal process, and, hence, the "Arrest" and "Prosecution" were made and conducted under legal authority. And the complaint here being one for "False Arrest" and "Malicious Prosecution", and not including an action for "False Imprisonment", the cases cited and argument made by the appellant concerning "False Imprisonment" are irrelevant to the issues.

The appellant relies upon the case of *Chapman v. Anderson*, 55 App. D. C. 165, 3 F. 2d 336, holding that to support an action for malicious prosecution, the plaintiff must prove the fact of prosecution, that the defendant was the prosecutor, or that he instigated its commencement, that it was made without probable cause, and that the defendant in making or instigating it was actuated by malice. The appellee maintains that each and every element announced by the Court in the *Chapman* case was proven by substantial evidence.

The Evidence Offered By The Plaintiff

With respect to the appellee's testimony narrated by the appellant in her brief at pages 12 and 13, the attention of the Court is respectfully referred to the appellee's statements upon cross-examination:

- "Q. I believe you told us, when the scout car got there that night about 10:30 P. M., the officer simply opened the door and forced you in. Is that it?
- A. He opened the door and pulled me in. He opened the door and reached around this way, and reached around and pulled me into the car.
- Q. Was that on the driver's side or the passenger side?
- A. On the passenger side.
- Q. And Mrs. Reichard approached the car on the driver's side?
- A. Correct.
- Q. And she said something, you didn't know what it was. Is that what you testified?
- A. She did. She stated something.
- Q. I am asking you—if I understand your direct testimony—she spoke to the driver, and the driver pulled you in the car?
- A. She spoke to the driver, and the driver pulled me into the car. That is exactly what happened."
(J. A. 15A)

The above testimony of the appellee is quoted in the belief that it showed, or that it was a reasonable inference of the jury to make, that although there was a lack of chronological sequence in his testimony, the appellee was not placed or forced into the police car until the appellant had first spoken to the arresting officer. From this, the inference follows that the appellant had identified the appellee as being the offender about whom she had made the complaint, and requested his arrest.

It may be true that appellee's next witness, Mrs. Falwell, did not testify concerning the "Arrest" or "Prosecution", but by the very testimony quoted by appellant in her brief at page 13, Mrs. Falwell gave evidence that at the time immediately preceding the arrest, the appellee had not been drinking. From this evidence the jury could have fairly inferred that the appellee was not drunk at the time of the arrest and that the charge, arrest and prosecution of appellee for drunkenness was made and instigated by the appellant maliciously and without probable cause.

Appellant's recital of the testimony of Franklin Louis Wells is a gross understatement. This witness fully and convincingly related without contradiction the admission made to him by appellant that she had caused the arrest of appellee. (J. A. 18A et seq.)

The Motion For A Directed Verdict For Defendant

Appellee says that the motion for a directed verdict made by appellant at the close of appellee's case was without merit.

Counsel for appellant cite the case of *Benham v. Vernon*, 5 Mackey (16 D. C.) 18, which was an action for trespass vi et armis. It is felt that the holding of the *Benham* case can be simply disposed of by reference to the fact that the plaintiff therein had failed to prove the necessary ele-

ments of a "trespass vi et armis", which is the common law remedy for "False Imprisonment", as opposed to "action on the case" which is the common law remedy for "Malicious Prosecution". 35 C. J. S. page 504, Section 4, False Imprisonment. The Court in the *Benham* case did, however, imply a remedy under circumstances similar to the instant case stating,

"If the declaration had alleged that the defendants, as officers, proceeded in making the arrest by virtue of a warrant, case instead of trespass might have been the remedy."

And in recognizing a right of action, the Court further stated,

"Where private persons cause an arrest to be made without a warrant, they are liable in some form of action, if it appears that no offense had been committed".

Appellant attempts on pages 15 and 16 of his brief to show a lack of evidence implicating her in the arrest by referring to parts of appellee's testimony covering the circumstances leading up to his arrest. It is true that appellee testified that the policeman had summarily placed him in the police car, but, as pointed out hereinbefore, he further testified that his arrest had occurred after the appellant had approached the police car and spoken to the driver.

Appellant's counsel refers to the testimony of Franklin Louis Wells as being equivocal. The application of such term as a description of the testimony of this witness is a loose use of expression and without foundation. Appellant's brief recites that the testimony of Franklin Louis Wells was all that prevented the Court from directing a verdict for the appellant at the close of appellee's case and, indeed, such testimony was more than sufficient to support the Court's holding. This witness positively

identified the appellant as being the person who had made the admission of having the appellee arrested:

“Q. What did your grandmother (appellant, Nellie Reichard) say to you?

A. Well, she told me that she had had Daddy (appellee) arrested. . . . (J. A. 18A)

* * * *

Q. How many times did your grandmother say she had had your father (appellee) arrested?

A. “Once.” (J. A. 19A)

* * * *

Q. What, exactly, was said to you about your father having been arrested?

A. Well, they didn’t tell me; and then after he told me, well, Eleanor — That is my mother — she told me about him being arrested once. Then Nellie — that is my grandmother — she told me too.

Q. She told you what?

A. She said he had been drunk that night, and she had him arrested. And they both said he was drunk.

Q. Did she tell you that once, or several times?

A. Several times.

Q. But she only told you, she only made reference to his having been arrested once.

A. Yes. (J. A. 19A, 20A)

Of importance also is the testimony of Franklin Louis Wells that his mother (appellee’s wife, Eleanor Wells) told him that “*after they found out about the suit*, she said she called the policeman”. (J. A. 22A) The only inference that the jury could have made from this statement was that the appellant had procured and instigated the arrest, and that the witnesses’ mother, upon learning of this action having been filed, was attempting to shield the appellant by assuming the censure herself.

How, then, can it be contended by counsel for the appellant that the boy’s statement was ambiguous or equivocal,

or to put it otherwise, that it was as consistent with the hypothesis that the appellant did not cause the arrest as it was with the hypothesis that she did. Nowhere in the record, except for the reference to the statement of the appellee's wife above explained, is there any testimony of Franklin Louis Wells that any one other than the appellant had caused and requested the arrest of the appellee. To the contrary, his testimony was affirmative that only the appellant had made such an admission to him. Even assuming that there were equivocal statements of this witness, such statement must be considered with all of the other testimony offered by him and considered such, as a whole, there is left no inconsistency detracting from the admissions of the appellant.

The Actual Circumstance Of Arrest

The appellant seeks, with regard to her conversation with the police officers that occurred at the time of the arrest, to raise the inference that, upon seeing the police apprehend the appellee, she merely identified him as her son-in-law without understanding that he was under arrest. Taken together with all the other evidence showing that the appellant had procured the arrest, such an inference is an unreasonable one to draw. Assuming that it did prove nothing in itself, it laid the basis for the proper inference that the appellant had been watching for the police and that upon their arrival she had identified the appellee and requested his arrest.

Some "False Arrest" and "Malicious Prosecution" Cases

The appellant contends that it was necessary for the appellee to prove every element of both "False Arrest" and "Malicious Prosecution" because both causes of action had been combined in the Complaint. The appellee says, to the contrary, that the causes of action should be con-

sidered as alternative and that, in any event, both were proved at the trial.

In the case of *Prigg v. Lansburgh*, 5 App. D. C. 34, cited by appellant, it is of the utmost relevance that in that case the defendant only gave information that an offense was committed and that some person was suspected of its commission. There was no identification of the plaintiff nor was there instigation or procurement of or request for the plaintiff's arrest. This point was amply covered and settled by this Court in the opinion rendered in *Chesapeake & Potomac Telephone Co. v. Lewis*, 69 App. D. C. 191, 99 F. 2d 424, the Court stating:

"The Prigg (referring to *Prigg v. Lansburgh*, supra) and Kinchlow cases are clearly distinguishable. So far as it appears, the information furnished by the defendants in those cases was neither intended nor very likely to result in imprisonment."

The evidence in the case at bar that the appellant had called the police and had identified the appellee at the time of the arrest was enough from which the jury might infer that it was both intended and practically certain to result in appellee's imprisonment; that it was an essential factor in the appellee's ensuing arrest; and therefore that the appellant must be held responsible. *Chesapeake & Potomac Telephone Co. v. Lewis*, supra. At least, it constituted substantial evidence tending to show that the appellant instigated the police officer to make the arrest and thus the burden was upon the appellant to meet the evidence. *Takahashi v. Hecht*, 62 App. D. C. 72, 64 F. 2d 710.

The appellant relies also upon the case of *Waters v. Anthony*, 20 App. D. C. 124, holding that because of lack of proof and the utter absence of testimony that the defendant had requested, caused or authorized the

arrest, and because it did not appear that the defendant had made any complaint, formal or informal, against the plaintiff, that the defendant could not be held liable. Appellee does not dispute the holding in the *Waters* case but agrees, that under the evidence adduced therein, there was a lack of proof that the defendant had caused or instigated the arrest. In that case, the defendant was approached by the detectives, it appearing from the record that they sought him, not he them, and in answer to their questions he communicated his suspicions to them. How different are the facts in the case at hand where the evidence showed that the appellant had called the police, that the appellant had had a conversation with the police immediately prior to the arrest, and where there was testimony that the appellant had herself admitted to the witness, Franklin Louis Wells, that she had caused the arrest of the appellee.

The appellee contends therefore that, under the law, a case of "False Arrest" and "Malicious Prosecution" was made out and was fully supported by substantial evidence.

The Evidence Adduced By Plaintiff As To Malicious Prosecution

The appellant complains that the only evidence adduced by appellee relating to "Malicious Prosecution" was his own personal testimony disclosing the fact that he had stood trial and was acquitted and again refers to the requirements to support an action for Malicious Prosecution handed down by the Supreme Court of the United States in the case of *Wheeler v. Nesbitt, et al.*, 65 U. S. 544, 16 L. Ed. 755, as approved by this Court in *Chapman v. Anderson*, 55 App. D. C. 165, 3 F. 2d 336.

Of these requirements, there is no controversy over the fact of "Prosecution". As to the requirement that the

defendant be the "Prosecutor" or that he instigated its commencement, appellant apparently assumes that the defendant must personally appear in Court and testify against the plaintiff, or that defendant must swear to a warrant or information. But the cases do not support such a theory. Mere passive knowledge or acquiescence on the part of the defendant may not be enough and, although the decided cases do not specify the degree of participation in the criminal prosecution required to make the defendant liable, the Courts have adopted what the appellee considers to be a most liberal interpretation of the term "Prosecutor" in actions based on "Malicious Prosecution". At 34 Am. Jur. 715, Section 22, Malicious Prosecution, it is said:

"In case of a criminal prosecution, the defendant must have been the Prosecutor, or at least the actor or moving cause in the Prosecution, and for the purpose of this form of action (malicious prosecution) the law looks behind theory and regards the person in fact instrumental in prosecuting the accused as the real prosecutor."

A person who makes a complaint to the District Attorney, in consequence of which a prosecution is commenced is the actor or moving cause in the prosecution, and is liable in damages for any injuries that may be sustained by the accused where the elements of a cause of action for malicious prosecution are present. 34 Am. Jur. 716, Section 23, Malicious Prosecution.

In the case of *Grant v. Duel*, 3 Rob. (La.) 17, 38 Am. Dec. 228, the defendant had called on the District Attorney, told him that he had been informed that the plaintiff had been stealing his hogs, and requested the attorney for the state to lay the matter before the Grand Jury. In pronouncing the defendant liable for the damages proved, the Court held:

"That the prosecution was commenced in consequence of the complaint made by Duel (the defendant) to the District Attorney is unquestionable. He was not, perhaps, a prosecutor, in the legal meaning of the term in England, and in many of the states where the common law prevails, yet he was the actor or moving cause in the prosecution, and is liable in damages for any injuries the plaintiff may have sustained * * *"

* * * *

The broad language employed by the Courts in like cases, where the original criminal complaint was made by the defendant to an officer of the law, supports the verdict herein. Thus, at 34 Am. Jur. 717, Section 23, Malicious Prosecution, it is stated:

"But if the charge is false to the knowledge of the complainant * * * or if he influences the police to assist him in sending an innocent man for trial, he would be regarded as the prosecutor."

Here there was sufficient evidence to warrant the jury in finding that the appellant had knowingly made a false charge against the appellee to the police causing the appellee, an innocent man, to be sent to trial. Therefore, the appellant, although she did not testify at the hearing or swear to the information, was in effect the prosecutor.

The liability of the arresting officers is not in question, but even had they acted with reasonable cause, that would not relieve the appellant from liability. The principle of law involved has been stated at 19 A. and E. Enc. of Law (2nd Ed.) p. 692, Malicious Prosecution, and followed in the cases of *DeArmond v. Saunders*, et al. (1942), 243 Ala. 263, 9 So. 2d 747, and *Gordon v. McLearn* (1916), 123 Ark. 496, 185 S. W. 803:

"One who advises and procures a third person to institute a malicious prosecution may be held liable in damages therefor, and one who aided and abetted the prosecutor in such action is liable equally with

the latter for damages therefor. Nor, will the fact that the person who, at the defendant's instigation, made the complaint had probable cause for believing it to be well founded avail the defendant as a defense where he acted without probable cause."

The appellant here is sufficiently a prosecutor to sustain the action against her for malicious prosecution since the prosecution to which the appellee was subjected was instituted at the appellee's request by a public officer having authority for such purpose. *Grant v. Duel*, supra.

As to the suggestion that the appellant did not have any knowledge of the prosecution, it is submitted that the charge made to the police by the appellant and the identification of him by the appellant to the police officer was intended and very likely to result in appellee's arrest and prosecution. Under such circumstances, the appellant is liable in damages. *Chesapeake & Potomac Telephone Co. v. Lewis*, supra.

The appellant has also placed in issue the elements of probable cause and malice. In respect to malice, the appellant, however, herself admits that malice may be presumed from the lack of probable cause and has even cited the authority for this proposition. *Wheeler v. Nesbitt, et al.*, supra. The fact of malice is usually inferred from the want of any probable cause or excuse for prosecution. *Grant v. Duel*, supra. So that it remained, as the principal burden upon appellee, to show a lack of probable cause. And since this burden of proving absence of probable cause is the onus of proving a negative, slight evidence will usually suffice. *Israel v. Brooks*, 23 Ill. 57.

The Supreme Court of the United States has well defined the degree of proof required in respect to probable cause, holding in the case of *Brown v. Selfridge*, 224 U. S. 189, 56 L. Ed. 727:

"While it is true that the want of probable cause is required to be shown by the plaintiff and the burden of proof is upon her in this respect, such proof must

necessarily be of a negative character, and concerning facts which are principally within the knowledge of the defendant. The motives and circumstances which induced him to enter upon the prosecution are best known to himself. This being true, the plaintiff could hardly be expected to furnish full proof upon the matter. She is only required to adduce such testimony as, in the absence of proof by the defendant to the contrary, would afford grounds for presuming that the allegation in this respect is true. In other words, the plaintiff was only obliged to adduce such proof, by circumstances or otherwise as are affirmatively within her control, and which she may fairly be expected to be able to produce."

Appellant cites authorities for the doctrine that, where the facts are not in dispute, it is the duty of the trial Court to determine, as a matter of law, the question of probable cause. Appellant then makes the categorical statement that there was no dispute of the fact of appellee's prosecution, who was the prosecutor, what witness appeared against him, for what cause, and that there was no malice. From this statement, the only deduction that can be made is that appellant labors under the belief that she is not responsible where, although she procured the prosecution, she did not personally testify at the trial. A review of the record overwhelmingly shows that the appellant was, in effect, the prosecutor, without reasonable cause, and that she acted maliciously.

The appellee having proved the Prosecution, its instigation by the appellant, and having carried the degree of proof required by law to show lack of probable cause, and having proved malice or adduced evidence from which it could be fairly inferred, it would have been error for the Court to have directed a verdict for the appellant.

2. The Court Did Not Err In Refusing To Instruct The Jury To Render A Verdict For The Defendant At The Close Of The Whole Case.

3. The Court Was Justified In Submitting The Issues To The Jury.
5. The Record Shows That There Was Substantial Evidence To Sustain The Verdict Of The Jury.

The Whole Evidence As To False Arrest

Other than the description contained in appellant's brief of the testimony given by the witness, Officer Fries, it is noteworthy that he testified:

"Q. Now, having looked at that record, does that refresh your recollection with respect to any incident that occurred that evening?

A. As I remember the call to 1816 Ingleside Terrace, for disorderly drunk * * *" (J. A. 25A)

And that upon cross-examination he testified:

"Q. But you do remember he was staggering?

A. I remember our attention was drawn to him. He was in front of the place where we had to call, and the way he was walking up the street, he wasn't walking like he was going to some definite address. He was more or less loitering around." (J. A. 28A)

Thus, there was more than what the appellant says was an arrest made by Officer Fries as a result of a routine scout car call received in a routine manner. By Officer Fries testimony above recounted, it was shown that the call made to the police was for a specific charge of "disorderly drunk". Accordingly, it was obvious that the informant (appellant) had more than just called the police, that she had, in fact, charged the appellee with being drunk.

Nor was the police officer's testimony without contradiction. On direct examination he testified that, in his opinion, the appellee appeared drunk, whereas upon cross-

examination he stated that the appellee was merely "walking up the street, he wasn't walking like he was going to some definite address, he was more or less loitering around".

The arrest had taken place a year and some months prior to the time of trial and this fact, together with other contradictory statements contained in Officer Fries' testimony (J. A. 27A et seq.), undoubtedly influenced his credibility before the jury. It was for the jury to decide, in reaching its verdict, that the officer's recollection was dimmed by the long lapse of time that had ensued between the arrest and trial, that the appellee was not drunk at the time of the arrest and, therefore, that the arrest was made because of the appellant's call and as a result of her identification of the appellee during the conversation which she had with the officer at the time of the arrest.

Appellant insists that the facts established by the evidence unequivocally show:

1. That Officer Fries was the only prosecuting witness.
2. That he instigated the prosecution by swearing to an information on October 5, 1946, concerning the arrest of October 2, 1946.
3. That he had probable cause to do so as an officer of the law.
4. That in making or instigating the charge, the officer was not actuated by malice but simply handling a routine case in a routine manner.

It is obvious that appellant misconstrues the law by raising the point that Officer Fries was the only prosecuting witness. Under the authorities hereinbefore cited, it is not necessary to show that the appellant actually testified at the trial or swore to the information, but it is sufficient if she advised and procured a third person to institute the malicious prosecution. Nor is it relevant whether or not the officer had probable cause to institute

the prosecution, for the fact that the person who, at the appellant's instigation, made the complaint had probable cause for believing it to be well founded, will not avail the appellant as a defense where she acted without probable cause. For the same reasons, it is not material, with regard to the appellant's liability, to resolve the question of malice on the part of the arresting officer.

Under the circumstances, there were no grounds to support the appellant's motion for a directed verdict at the close of the whole evidence.

4. The Court Did Not Err In Refusing To Instruct The Jury As Requested By Appellant.

Appellant takes issue with the refusal of the Court to instruct the jury as follows:

"The jury are instructed if they find that the defendant furnished the police with information to the effect that the plaintiff was suspected of some unlawful act, this is not sufficient to warrant any inference that the defendant in any way participated in the arrest and imprisonment of the plaintiff."

The refusal of the Court to issue such a negative instruction can hardly be said to constitute reversible error, where the Court did issue substantially the same instruction specifically defining what must be found by the jury in order to bring in a verdict for the appellee. The Court did instruct the jury:

"There has been testimony concerning the action of a police officer or officers in this case. If the arrest and prosecution of the plaintiff, on the charge for which he was arrested, was due *solely* and *only* to the action of the police officer, then it cannot be said that the defendant caused such arrest and prosecution. In that event, of course, your verdict will be for the defendant." (J. A. 47A)

And the Court further instructed in this connection:

"To find for the plaintiff, against the defendant, in this cause, you must find from the evidence — and,

of course that means you can make reasonable inferences from facts you have found from the evidence — that the defendant did call or caused to be called the police officers, asking them to arrest the plaintiff on the ground of drunkenness. I mean, in the absence of that sort of a complaint, there wouldn't be the sufficient showing that she caused the arrest to be made.” (J. A. 52A)

The appellant presents the principle that the Courts, for obvious law enforcement reasons, are desirous of protecting a citizen from a civil responsibility for reporting to police officers the commissions or suspected commissions of crimes.

The appellee concedes this, but says that the tendered instruction would have been superfluous in view of the evidence and, particularly, since the Court, as hereinabove set out, was exceedingly careful to lay down the positive findings that the jury must make in order for the appellant to be held liable in damages. Then, too, the Court did, in effect, state the principles urged by appellant by instructing that “if the arrest and prosecution of the plaintiff, on the charge for which he was arrested was due *solely* and *only* to the action of the police officer, then it cannot be said that the defendant caused such arrest and prosecution.”

The instructions therefore, covering in substance those suggested by appellant and, in any event, being specific and complete as to the law of the case, were according to law and the denial of appellant's requested instructions can not be said to be reversible error or ground for a new trial.

The Court Did Instruct The Jury Pursuant To Law

The appellant urges that the Court's instructions failed to embody the element “that the defendant was himself the Prosecutor, or that he instigated its commencement.”

What could be more clear than the instruction of the Court that the plaintiff must show “a former, criminal

prosecution of the plaintiff, by the present defendant". (J. A. 45A) This instruction taken together, as it must be, with the other instructions amplifying and defining the meaning and extent of the "former, criminal prosecution of the present plaintiff by the present defendant" could not directly or indirectly have given or left the jury with the impression that the appellee could recover where the police officer was sole prosecutor and prosecuting witness. In this connection, appellee again respectfully refers this Court to the lower Court's careful exposition that the appellant would not be liable if the arrest and prosecution were due "*solely and only* to the action of the police officer". (J. A. 47A)

The appellant reads a contradiction into the following instruction:

"To find for the plaintiff, against the defendant, in this cause, you must find from the evidence — and of course that means you can make reasonable reference from facts you have found from the evidence — that the defendant did call or caused to be called the police officers, asking them to arrest the plaintiff on the ground of drunkenness." (J. A. 52A)

To say that this, standing alone, is tantamount to telling the jury that the case was one for "False Arrest" is true. To say that this was tantamount to telling the jury that the case was one for "False Arrest" instead of one for "Malicious Prosecution" is not well taken. The appellee maintains that it is not proper to consider this single instruction standing alone, but that all of the instructions must be read as a whole in order for the true meaning and effect to be given.

This particular instruction in question was laid down by the Court subsequent to a request of appellant's counsel for amplification of what the jury must find was the appellant's part or participation in the arrest if there was to be a showing of her liability. To attempt to confuse this instruction as referring to "False Arrest" and

not "Malicious Prosecution" is to ignore the law, for the elements contained in such instruction are part and parcel of both "False Arrest" and "Malicious Prosecution", the elements of the latter embracing and including all of the elements of the former under facts like those in the case at bar.

It can hardly be denied that it was necessary for the jury to find under both causes of action that "the defendant did call or caused to be called the police officers, asking them to arrest the plaintiff on the ground of drunkenness" and accordingly it is submitted that this instruction, rather than confusing the jury, could only have served, as the Court obviously intended, to clarify the instructions previously given.

For the reasons stated it is believed that the Court's instructions were clear, complete and correct and give no basis whatsoever for the suggestion of error.

6. The Verdict And Judgment Are Not Excessive.

The amount of the verdict is within the jury's discretion as they see the damages suffered. The trial Court issued adequate instructions as to the damages which, considered with the evidence adduced at the trial, were sufficient to support the finding of damages. It was shown conclusively that the appellee had suffered severe mental and nervous shock and had been injured in his good name and reputation. There is no evidence in the record of corruption or passion on the part of the jury and their discretion in fixing the damages should not be interfered with or disturbed in the absence of clear and convincing reasons.

7. The Court Was Justified And Did Not Err In Denying The "Motion Of Defendant To Set Aside Verdict Of Jury, And To Have Judgment Entered In Accordance With The Defendant's Motion For Directed Verdict; Or, In The Alternative, That Defendant Be Granted A New Trial."

Neither the evidence nor the law would have justified the Court in granting this motion of appellant.

CONCLUSION

In concluding, the appellee respectfully certifies the following question for consideration :

“How else would the appellee have been arrested and subsequently brought to trial had not the appellant instigated, requested and procured appellee’s arrest through the police officers having authority for such purposes.”

If the appellant had not maliciously and falsely requested appellee’s arrest, the criminal prosecution would never have been, and the appellee respectfully maintains that appellant should be and must be held responsible for what was the clearly foreseeable and proximate result of her act. The jury chose to believe from the evidence, as they had the right to do, that the appellant had instigated and procured the arrest and prosecution of the appellee and he respectfully says that the appellant has failed to show good and sufficient reason either in law, or under the evidence, for the Court to reverse the judgment or to order a new trial.

For the foregoing reasons appellee respectfully requests the Court to affirm the judgment of the lower Court and to dismiss this appeal.

Respectfully submitted,
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No. 9983

REPLY BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NELLIE REICHARD, *Appellant*,

VS.

LOUIS A. WELLS, *Appellee*.

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia
Circuit

FILED SEP 28 1949

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CLERK

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 9983

NELLIS REICHARD, *Appellant*

VS

LOUIS A. WELLS, *Appellee*

REPLY BRIEF

PRELIMINARY STATEMENT

Because it is believed that certain evidential facts are not accurately presented in appellee's brief, it has been deemed necessary to make this reply.

REPLY TO APPELLEE'S "STATEMENT OF THE CASE"

The Evidence as to When Appellant Arrived at the Scene of Appellee's Arrest

Appellee in the opening paragraph of his brief seeks to create the impression that appellant *first* spoke to the driver of the police car, "and that *afterwards* the driver pulled [appellee] into the car." (Appellee's brief, page 1). Appellee, on page 5 of his brief, sets out the portions

from the joint appendix which he claims support this conclusion, and on page 6 of his brief argues for such a conclusion. Throughout the remainder of his brief this conclusion is reiterated frequently in argument.

It is submitted that the phrase voiced by appellee in response to, and in the identical words of, defense counsel, (App. 15A) was an inadvertent reflex statement resulting from a slip of the tongue by defense counsel, and totally and completely contrary to the substance of appellee's direct and cross examination. (App. 9A through 15A).

In this connection, it is important to note, in addition to the chronology and context of appellee's testimony:

1. That appellee approached the police car from "mother-in-law's side of the street." (App. 10A, bottom).

2. That he approached the police car "thinking it was the policeman I had sent for," (App. 11A, top) and "told him [the policeman] I wanted to see him." (App. 11A, bottom).

3. That his arrest was almost simultaneous with his reaching the side of the police car. The policeman on the passenger side, "didn't do a thing, without letting me say a word or anything; he just pulled the door open—" (App. 11A, top) Also, "after I had walked off the sidewalk to the car," (apparently from the direction of appellant's home) "neither policeman had gotten near me. Then the policeman grabbed me by the shoulder and pulled me in there." (App. 11A, bottom. See also reiteration, App. 15A, top).

4. The reason assigned by appellee for not hearing the conversation between the officers and appellant was, "because the drunken fellows in the back of the car was carrying on so." (App. 11A, bottom).

It is believed that the construction sought to be placed upon appellee's testimony in his own brief affords a most absurd example of a "scintilla" or "spark" of evidence.

Recapitulation and Summary of Evidence

In summary, therefore, it seems that the evidence submitted by appellee is as follows:

1. That there may have been ill feeling between appellee and appellant.
2. That appellee was arrested by police officers in front of appellant's house. (App. 11A).
3. That at the time of appellee's arrest "he [the policeman] wouldn't tell me what he was pulling me in for." (App. 11A).
4. That after appellee's arrest, appellant came out in the street and said something (subject matter not stated) to the policeman at the car door. (App. 11A, and see discussion supra, first subheading hereof).
5. That the police drove him off and jailed him (App. 11A).
6. That the police subsequently charged appellee with being drunk; that appellee went to trial and was acquitted. (App. 12A-13A).
7. Appellee says he does not drink and was not drunk at the time of his arrest.*
8. Appellee's nine year old son, Franklin, testified that appellee, "told me she had had Daddy arrested, and that was about all, you know." (App. 18A).

Against this we have the uncontradicted testimony of the police officer that he arrested appellee in front of appellant's house, that appellee appeared to be drunk, and he so charged him, that he does not remember appellant, and that he was in front of premises pursuant to a routine radio call; (App. 25A-32A) the uncontroverted record in the Municipal Court; (App. 42A) together with the statement of Mrs. Wells that it was she who telephoned the police station on advice of counsel, that her

* The testimony of the witness, Mrs. Falwell, (App. 15A to 17A) is so vague and ambiguous as to time as well as fact as to be incompetent.

request was merely to remove appellee from the threatening post he had taken up near her residence; and that according to his activities in her residence and vicinity, she was well justified in asking such protection. (App. 33A-36A).

CONCLUSION

Although it is believed that other conclusions of fact are erroneously stated in appellee's brief, specific reference will not be made thereto.

As to the law, there is ample authority in this jurisdiction on the issues presented by this appeal, the many decisions of this Court being the foremost; therefore, it does not seem necessary to refute quotations from general law encyclopedias and incidental, isolated cases from other jurisdictions (including a civil law jurisdiction, admittedly opposed to the common law in the part quoted).

The question posed at the conclusion of appellee's brief seems to answer itself. Nevertheless, it may be answered by asking another question:

"Is any communication had with a police officer or law enforcement agent near the time of an arrest to make such officer the agent of the communicant; and if so, how can a citizen safely converse with such an officer without fear of being mulcted in damages?"

Respectfully submitted,

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 9983

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VS.

LOUIS A. WELLS, *Appellee*

Appeal from the United States District Court
for the District of Columbia

PETITION FOR REHEARING

Nellie Reichard, Appellant in the above entitled cause, petitions this Court for a rehearing in said cause under Rule 26 of the Rules of this Court, and for reason therefor, shows as follows:

1. This petition is grounded on the single question of the trial court's refusal to instruct the jury in substance, that:

"Mere information to the officers of the law by a citizen, tending to show that an offense has been committed and that some person named may be suspected of its commission, is not sufficient, of itself, to warrant the inference that the informer or his agents participated in the unlawful arrest and imprisonment of the accused by the officer."

2. This point was raised in appellant's brief under Point number four in the "Statement of Points upon which Appellant Relies," and was treated in argument at page 32 *et seq.* therein.

3. Counsel for Appellant (defendant) called the attention of the Court to his desire to have the jury instructed along the lines set out above at the close of the evidence, which request was denied. (Joint Appendix, page 45 A). This point was again urged upon the Court upon the completion of the charge to the jury, at which time the printed report of *C. & P. T. Co. v. Lewis* (1938), 69 App. D. C. 191, 192, was shown the Court and the appropriate language set out above indicated (Joint Appendix, page 51 A). The Court refused to charge the jury accordingly, an exception was taken, and the supplemental charge of the Court gave free reign to the jury to draw the illegal inference sought to be forestalled by the proposed instruction. (Joint Appendix 52 A). Under the decision of this Court in *Winstead v. Hildebrand* (1947), 81 U. S. App. D. C. 368, 160 F. 2d 222, construing Rule 51, Federal Rules of Civil Procedure, the ruling on the instruction is properly before this Court for review.

4. The substance of the requested instruction is not only announced in *C. & P. T. Co. v. Lewis (supra)*, but it is the settled law of this jurisdiction.

Prigg v. Lansburgh, 5 App. D. C. 30, 38;

Waters v. Anthony, 20 App. D. C. 124;

Kinchlow v. Peoples Rapid Transit Co., 66 App. D. C. 382 (certiorari denied, 301 U. S. 693; 57 S. Ct. 926; 81 L. Ed. 1349.)

5. The substance of this instruction is particularly applicable to this case, whether the case be considered one of false arrest, malicious prosecution or other action; and it was crucial to the defense thereof. This is especially so in view of the nebulous evidence adduced (if any) to connect defendant with the arrest and/or prosecution

(See Appellant's Reply Brief, Page 3 for summary). The confusing, scanty, and erroneous charge to the jury, in which the Court first refers to "malicious prosecution," (Joint Appendix, page 45 A) and later treats the question of arrest (Joint Appendix top page 47 A; page 52 A), cries out for clarification and limitation.

6. This point is of grave public consequence, involving as it does the right of a citizen to inform lawful authorities of a violation of law. This right (and duty) is a right secured by the Constitution, *In re Quarles and Butler*, 158 U. S. 532, 535-6. The protection of this right requires that communications to prosecuting authorities be absolutely privileged, *Vogel v. Gruaz*, 110 U. S. 311. If a jury may be allowed to draw from the fact of innocuous communication with law enforcement authorities, the inference of actionable conduct, then the constitutional right, the peace and good order of society, are seriously jeopardized.

WHEREFORE, the premises considered, your petitioner respectfully prays that a rehearing of this cause may be granted and for such other and further relief as to the Court may seem meet and proper.

NELLIE REICHARD

By EMMETT LEO SHEEHAN
LONDON GERALD DOWDEY

Attorneys for Appellant
223 Bond Building
Washington, D. C.

CERTIFICATE OF COUNSEL

We hereby certify that the foregoing Petition for Re-hearing is presented in good faith and not for delay.

LANDON G. DOWDEY
EMMETT L. SHEEHAN
Counsel for Appellant.

PROOF OF SERVICE

I certify that a copy of the foregoing petition was served on the Appellee by leaving a copy of same at the office of his attorneys, Toomey and Mehler, 1025 Vermont Avenue, N. W. this day of November, 1949.

LANDON G. DOWDEY
Of Counsel for Appellant.

FILED NOV 18 1949

United States Court of Appeals

Joseph W. Stewart

CLERK

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 9983

NELLIE REICHARD, *Appellant*

VS.

LOUIS A. WELLS, *Appellee*

ANSWER TO PETITION FOR REHEARING

Comes now LOUIS A. WELLS, Appellee in the above entitled cause, and in answer to Appellant's petition for rehearing, respectfully states as follows:

1. Appellant petitions this Court for a rehearing solely because of the Trial Court's refusal to make an instruction to the Jury which she says was crucial to her defense. The instruction in issue, however, was argued before this Court at the time of the original hearing of the appeal and was fully treated by Appellee in his brief at pages 18 and 19. Further, this Court in its opinion stated that "we find no merit in Appellant's objection to the Court's charge." In any event, Appellee submits that the requested instruction was substantially given by the Trial

Court and that the elements of false arrest and malicious prosecution were fully set out and explained to the Jury by the Court in the whole of its instructions.

2. So far as the Appellant relies upon the cases cited in paragraph 4 of her petition, Appellee contends that these cases are distinguishable from the instant case and respectfully refers the Court to his arguments advanced at pages 10 and 11 of his brief.

3. Appellant strongly urges that it is the right of a citizen to inform lawful authorities of a violation of law and cites as her authority for this proposition *In re Quarles and Butler*, 158 U. S. 532. Appellee concedes this right of a citizen but responds that it in no way detracts from or limits the right of a complainant to seek his damages where the citizen has had him falsely arrested or maliciously prosecuted. Nor would the case *In re Quarles and Butler*, supra, imply in any way that a citizen should not answer in damages for a false arrest or a malicious prosecution. That case was founded upon facts readily distinguishable from those at hand in that there the person informed upon had actually committed a violation of the law and there was no question raised or action brought concerning false arrest or malicious prosecution. In this connection, the Appellee respectfully calls to this Court's attention that he was falsely arrested and prosecuted for an offence of which he was acquitted, all at the instance of the Appellant who acted maliciously and without probable cause.

4. The case of *Vogel v. Gruaz*, 110 U. S. 311, is relied upon by the Appellant for the proposition that communications to prosecuting authorities are privileged. This principle, however, is irrelevant to the issues here in that no question of privilege was raised to the Trial Court nor was there any privileged testimony offered by Appellee in the proof of his case.

WHEREFORE, the premises considered, Appellee respectfully prays the Court to dismiss Appellant's petition for rehearing.

JAMES C. TOOMEY
RICHARD A. MEHLER
1025 Vermont Ave.
Washington, D. C.
Attorneys for Appellee

PROOF OF SERVICE

I certify that a copy of the foregoing petition was served on the Appellant by leaving a copy of same at the office of her attorney, Emmett L. Sheehan Esq. Bond Building, Washington, D. C., this 18th day of November, 1949.

TOOMEY and MEHLER,

By
Attorneys for Appellee.